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Supreme Court, U.S.
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No. 1

In The
Supreme Court of the United States

W. RUSSELL DUKE, JR., AND NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT EXPENDITURES, *Petitioners,*

v.

LARRY LEAKE, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petition for a Writ of Certiorari

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Questions Presented

Decisions of this Court have established that the First Amendment protects both candidates and independent groups from limits on their political expenditures. North Carolina, like many other states, has adopted a public financing scheme for certain state elections that contains provisions that burden such speech by providing additional public funds to rescue publicly funded candidates from independent spending by citizens groups and from "excess" spending by privately funded opposing candidates and by imposing substantial unilateral reporting requirements on them. The Fourth Circuit below held that these rescue funds did not burden the free speech rights of independent spenders and privately funded opposing candidates, expressly rejecting the reasoning of the Eighth Circuit decision in *Day v. Holahan*. But this Court in *Davis v. FEC* endorsed the reasoning of *Day* and held that benefits to one candidate burdens the First Amendment rights of the other.

(1) Whether the rescue funds provisions of North Carolina's public financing scheme violate the First Amendment:

   (a) because the rescue funds unconstitutionally burden core political speech, and

   (b) because their disproportionate reporting requirements unconstitutionally burden core political speech.

Parties to the Proceedings

The following individuals and entities are parties to the proceedings in the court below:

W. Russell Duke, Jr., North Carolina Right to Life Committee Fund for Independent Expenditures, and North Carolina Right to Life State Political Action Committee,[1] *Plaintiffs-Appellants;*

Barbara Jackson, *Plaintiff* (she did not participate in the appeal of the district court decision to which she was a party);

Larry Leake, Lorraine G. Shinn, Charles Winfree, Genevieve C. Sims, Robert Cordle, Roy Cooper, C. Colon Willoughby, Jr., and Robert Stuart Albright, *Defendants-Appellees*;

James R. Ansley, and Common Cause North Carolina, *Intervenors-Defendants-Appellees*;

Keith M. Kapp; J. Michael Booe, David Benbow, David Yates Bingham, Gilbert W. Chichester, Renny W. Deese, Jim R. Funderburk, John E. Gehrig, Isaac Heard, Jr., Patricia L. Holland, Margaret Hunt, Margaret McCreary, David T. Phillips, Fred D. Poisson, Sr., Donald C. Prentiss, Richard Roose, Jan H. Samet, and Judy D. Thompson, *Defendants* (they did not participate in the appeal of the district court's decision to which they were a party).

Corporate Disclosure Statement

North Carolina Right to Life Committee Fund for Independent Expenditures has no parent corporation,

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[1] North Carolina Right to Life State Political Action Committee is not a party to this appeal.

and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioners Duke and North Carolina Right to Life Committee Fund for Independent Expenditures respectfully request a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The order of the court of appeals affirming the district court is at 534 F.3d 427. App. 1a. The district court opinion is at 476 F. Supp. 2d 515. App. 24a.

Jurisdiction

The court of appeals upheld the district court's decision on May 1, 2008. App. 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I is in the Appendix at 55a.
N.C. Gen. Stat. § 163-278.6 is at 55a.
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N.C. Gen. Stat. § 163-278.67 is at 78a.

Statement of the Case

This case presents a constitutional challenge by W. Russell ("Rusty") Duke, a 2006 judicial candidate for the North Carolina Supreme Court, and North Carolina Right to Life Committee Fund for Independent Political Expenditures ("IEPAC") to the rescue provisions of North Carolina's public financing scheme, N.C. Gen. Stat. § 163-278.61 *et seq.*, because the scheme's rescue funds and related reporting requirements impose a substantial unconstitutional burden on the political speech of independent political spenders and privately funded candidates. *Id.* at §§ 164.-278.62–164.278.67.[2] These provisions chill Mr. Duke and IEPAC's ability to engage in protected political speech and are unconstitutional on their face and as applied to their expenditures.

I. The Statutory Scheme

In 2002, the North Carolina Legislature created a public financing scheme for judicial elections in North Carolina. *See* N.C. Gen. Stat. §§ 163-278.62 through 163-278.70, and § 163-278.13. Under this public funding scheme, judicial candidates who wish to

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[2]The case below also involved a challenge to North Carolina's 21-day pre-election contribution ban, found at N.C. Gen. Stat. § 163-278.13(e2)(3), brought by North Carolina Right to Life State Political Action Committee ("SPAC"). Because the North Carolina is in the final stages of adopting a bill repealing this provision, Duke and SPAC do not seek review of that provision. *See* Senate Bill 1263, Section 7(a), *available at* http://www.ncleg.net/Sessions/-2007/Bills/Senate/HTML/S1263v5.html. As a result, SPAC does not join this appeal.

receive funds must first "file with the North Carolina Board of Elections a declaration of intent to participate in the act as a candidate for a stated office," affirming that

> only one political committee, identified with its treasurer, shall handle all contributions, expenditures, and obligations for the participating candidate and that the candidate will comply with the contribution and expenditure limits set forth in subsection (d) of this section and all other requirements set forth in this Article or adopted by the Board.§ 163-278.64(a). Candidates are ineligible to participate in the fund if they have collected more than $10,000 in contributions or made expenditures in excess of $10,000 prior to filing the declaration of intent.

Id. at § 163-278.64(d)(1).

After the candidate has filed a declaration of intent, he becomes a "participating" candidate, and may apply to be certified to receive public funding. *Id.* at § 163-278.64(b). To be certified, a candidate must raise qualifying contributions, from at least 350 registered voters, that total between 30 and 60 times the filing fee, for the candidate's respective office. *Id.* at § 163-278.62(9), (10) & (18); § 163-278.64(b). Thus, in 2006, a candidate for Supreme Court would have needed to raise between $34,590 and $69,180, and a candidate for Court of Appeals would have needed to raise between $33,150 and $66,300. *Id.* at § 163-278.62(9), (10) & (18); § 163-278.64(b). When a participating candidate has received this level of support, he

can submit an itemized report of contributions to the Board. *Id.* at § 163-278.64(c)(2). The Board then certifies that the candidate has met the requirements of § 163-278.64(c).

The participating candidate, now a "certified" candidate, is then eligible to receive an initial distribution of government funds to her campaign, if she faces a contested general election campaign. *Id.* at § 163-278.65(b)(4). This government contribution to the candidate's campaign is "in an amount equal to 125 times the candidate's filing fee" for Court of Appeals races ($138,125 in 2006) and 175 times the candidate's filing fee for Supreme Court races ($201,775 in 2006). *Id.* § 163-278.65(b)(4).

Additional government contributions are available to a certified candidate if the combined sum of (a) expenditures by her noncertified opponent, (b) independent expenditures[3] made in support of that opponent, and (c) independent expenditures in opposition to the certified candidate exceeds a certain trigger amount.[4] *Id.* at § 163-278.67(a). These additional

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[3]An independent expenditure is defined as "an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes." *Id.* at § 163-278.6(9a).

[4]This trigger amount is equal to the maximum qualifying contribution sum in the case of a primary, and the amount of the initial distribution in the case of a general election. *Id.* at § 163-278.62(18).

government contributions, or "rescue funds," as they were originally described,[5] are made in an "amount equal to the reported excess." *Id.* at § 163-278.67(a). That is, for every dollar spent over the trigger amount by a noncertified opponent and by an independent group in support of the noncertified opponent or in opposition to the certified opposing candidate, the certified candidate receives a dollar of government contributions to her campaign. *Id.* at § 163-278.67(a). Rescue funds are "limited to . . . two times the amount described in G.S. § 163-278.65(b)(4)," either $132,600 (Court of Appeals) or $138,360 (Supreme Court) in a contested primary and either $276,250 (Court of Appeals) or $403,550 (Supreme Court) in a contested general election. *Id.* at § 163-278.67(c)&(d).

Importantly, independent expenditures in support of a certified candidate or in opposition to a non-certified candidate are not included when calculating the trigger amount, and no rescue funds are issued to noncertified candidates nor deducted from a certified candidate's government funding based on any independent expenditures made in support of a certified candidate. *Id.* at § 163-278.67(a).

In order for the Board of Elections to determine when the trigger amount has been reached, the North Carolina public financing scheme sets up a series of

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[5]The District Court decision described these funds as "rescue funds," *see* App. 27a, because the North Carolina law described them in this way. But the Court of Appeals described them as "matching funds" because North Carolina changed the statutory description of these funds when this case was on appeal. *See* App. 11a.

reporting requirements for noncertified candidates and citizens groups that are not imposed on certified candidates. *Id.* at § 163-278.66(a). Noncertified candidates with certified opponents are required to "report total income, expenses, and obligations to the Board by facsimile machine or electronically within 24 hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for rescue funds." *Id.*[6] Subsequently, noncertified candidates must follow an expedited reporting schedule, set by the Board, or, if such a schedule has not been set, must file additional reports "after receiving each additional amount in excess of one thousand dollars ($1,000) or after making or obligating to make each additional expenditure(s) in excess of one thousand dollars ($1,000)." *Id.*[7]

Likewise, "any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified candidate" is required to "report the total funds received, spent, or obligated for those expenditures to the Board by facsimile machine or electronically within 24 hours

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[6]This reporting requirements are in the process of being amended to only require reporting of contributions. *See* Senate Bill 1263, Section 10.2(a), *supra* note 2.

[7]After this lawsuit was filed in the district court, the Board set an expedited reporting schedule for the 2006 election, requiring eight reports to be filed between August 22, and November 3, 2006. Senate Bill 1263, Section 10.2(a), *supra* note 2, will remove the $1,000 threshold requirement to leave expedited reporting requirements at the discretion of the Board.

after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures, exceeds five thousand dollars ($5,000)."[8] *Id.* Subsequently, such groups must follow the same expedited reporting schedule as noncertified candidates, filing additional reports. *Id.*

Under these reporting requirements, noncertified candidates could be required to file dozens of separate reports during the primary and general election campaign before the trigger amount has even been reached, and every day thereafter. *Id.* In contrast, a certified candidate need make only two reports—one during the certification process and one after the election. *Id.* Similarly, independent groups that support a noncertified candidate or oppose a certified candidate may be subject to substantial reporting during the campaign season, whereas independent groups opposing a noncertified candidate are never required to file any reports. *Id.*[9]

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[8]Section 163-278.66(a) originally required an entity making independent expenditures to report expenditures only if they both surpassed, in total, the threshold of $3,000 and were made after the candidate spent "fifty percent (50%) of the trigger for rescue funds"—usually near $100,000. N.C. Gen. Stat. § 163-278.66(a). Effective August 3, 2006, the statute was amended removing the 50% line and changing the threshold expenditure amount from $3000 to $5000.

[9]For reasons that are unclear, independent expenditures made in support of a certified candidate are subject to the reporting requirements, even though such expenditures

II. The Facts

W. Russell Duke is a judge in North Carolina Superior Court for Judicial District 3A. AC ¶ 19.[10] He ran for Supreme Court Justice in 2006 as a non-certified candidate facing a certified opponent and raised in excess of the trigger amount. AC ¶¶ 19, 24.

Judge Duke was required to report within 24 hours all expenditures and obligations he made throughout his campaign once the amount of his campaign expenditures exceeded 80% of the trigger amount, or $168,620 for the general election. § 163-278.66(a); Duke Aff. ¶ 4. North Carolina Right to Life Committee Fund for Independent Political Expenditures ("IEPAC") was subject to a similar provision which requires reporting of initial independent expenditures and obligations over $5000. § 163-278.66(a). Once this occurred, Judge Duke and IEPAC would have been required to follow an expedited reporting schedule. *Id.*

Judge Duke had to decide whether to limit his campaign expenditures so as not to exceed the trigger amount during his 2006 campaign—assuming no independent expenditures were made supporting him, which was beyond his control—or to suffer the penalty of triggering rescue funds for his certified opponent. Ultimately, Judge Duke made expenditures over the trigger amount, which resulted in rescue funds being

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do not affect the distribution of rescue funds. *Id.* rescue fundsat § 163-278.66(a).

[10]Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief ("AC") was verified by Judge Duke, and by Barbara Holt, President of IEPAC.

provided to his opponent. AC ¶ 32.

Likewise, IEPAC intended to make independent expenditures in support of a noncertified candidate or in opposition to a certified candidate. AC ¶ 37. However, because IEPAC's expenditures would count towards the trigger amount and could result in government contributions being issued to candidates they opposed, IEPAC did not make independent expenditures in favor of any noncertified candidate. AC ¶ 37.

III. The History of the Litigation

On August 8, 2005, Duke and IEPAC filed suit in the Middle District of North Carolina (Cause No. 5:06-cv-00324) against the Board, the Districts Attorney of Wake and Guilford Counties, and the Attorney General, challenging North Carolina's rescue provisions under the First Amendment. An Amended Complaint was filed on September 7, 2005. The Board filed its Motion to Dismiss on November 14, 2005, and Intervenors filed their Motion to Dismiss, as well as their Motion to Intervene, on November 15, 2005.

On August 11, 2006, the case was transferred to the Eastern District of North Carolina. Duke and IEPAC then filed a Motion for Preliminary Injunction, which was denied on October 26, 2006. On March 30, 2007, the District Court entered final judgment granting the Board's and Intervenors' respective Motions to Dismiss.

Notice of appeal was filed on April 26, 2007. The court of appeals affirmed the district court in an opinion filed May 1, 2008.

Reasons for Granting the Petition

This case is at the forefront of a long raging judicial debate over the constitutionality of provisions of public financing schemes that award rescue funds to publicly funded candidates in order to fend off "excess" spending by privately funded opponents and independent spending opposing such publicly funded candidates.

These rescue funds provisions have resulted in extensive litigation focused on whether the rescue funds cause a cognizable First Amendment burden on privately funded candidate's speech and on independent spending or merely function as a benefit enjoyed by the publicly funded candidate. The Eighth Circuit determined that rescue funds were a cognizable First Amendment burden on independent spending in *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994). Conversely, the First Circuit in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), perceived only a benefit for the publicly funded candidate. *Id.* at 466-72. The Fourth Circuit below, when faced with this precise issue in this litigation, rejected *Day* and agreed with *Daggett* in finding North Carolina's rescue funds and attendant reporting requirements constitutional. App. 15a.

This places the Fourth Circuit on the wrong side of the circuit split. In *Davis v. FEC*, 128 S. Ct. 2759 (2008),[11] this Court endorsed the rationale of *Day* to

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[11] *Davis* was handed down by this Court on June 26, 2008, after the Fourth Circuit's decision herein. While this appeal was pending in the Fourth Circuit, this Court took up *Davis* and Duke filed a Notice of Supplemental Author-

support its conclusion that Section 319(a) of BCRA burdened free speech:

> Many candidates who can afford to make large personal expenditures to support their campaigns may choose to do so despite § 319(a), but they must shoulder a special and potentially significant burden if they make that choice. *See Day v. Holahan*, 34 F.3d 1356, 1359-1360 (C.A.8 1994) (concluding that a Minnesota law that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures against her candidacy burdened the speech of those making the independent expenditures).

Davis, 128 S. Ct. at 2772. Thus, in rejecting the reasoning of *Day*, the Fourth Circuit was plainly wrong. As a result, this Court should either (1) grant certiorari, and summarily vacate the Fourth Circuit opinion and remand this case to be reconsidered in light of *Davis*, or (2) grant certiorari and decide this case on the merits.

I. This Case Involves a Matter of Great Public Importance Because North Carolina's Rescue Funds Provisions Are Just One of Many Across the Nation.

Public funding of candidate campaigns has long been advocated by some campaign finance reformers

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ity with the Fourth Circuit on January 16, 2008, noting the pendency of *Davis* in this Court and suggesting that the Fourth Circuit await this Court's decision in *Davis*. The Fourth Circuit declined to do so and issued it opinion before *Davis* was decided.

and has become a feature in a significant number of federal, state, and municipal jurisdictions. The Federal Election Campaign Act contains a public funding scheme for candidates for President,[12] and Congress is currently considering a proposal for public funding of congressional elections that contains provisions similar to the rescue funds and reporting requirements of the North Carolina scheme.[13] In addition, there are several States and localities that provide public funding for certain elections, including Arizona, Connecticut, Hawaii, Maine, New Jersey, Albuquerque, New Mexico, and Portland, Oregon.[14] Many of these schemes provide rescue funds and contain reporting requirements similar to those at issue in this case.[15]

Furthermore, in 2002, the American Bar Association specifically endorsed public funding for judicial

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[12]26 U.S.C. §§ 9001 to 9013. This federal scheme does not contain any provision for rescue funds.

[13]Fair Elections Now Act, S. 936, 110th Cong. § 511 (2007) (providing "fair fight" funds to participating candidates based on opposition spending.); *see also Id.* at § 103 (providing disproportionate reporting requirements for nonparticipating candidates).

[14]*See, e.g.*, Ariz. Rev. Stat. Ann. §§ 16-901.01, -940 to -961 (2006); Conn. Gen. Stat. §§9-333a to -333n, 9-700 to -751 (Supp. 2006); HI Stat.. § 11-217 et seq. (West 2008); Me. Rev. Stat. Ann. 21-A, §§ 1121-1128 (Supp. 2006); N.J.S.A. 19:44A-30 et seq. (2004).

[15] *See, e.g.* Ariz. Rev. Stat. Ann. §§ 16-941(B)(2), 16-952 (2006); Conn. Gen. Stat. §§ 9-712, 9-713, 9-714 (Supp. 2006); Me. Rev. Stat. Ann. 21-A, § 1017(3-B), 1125(9) (Supp. 2006); N.J.S.A. 19:44A-30 et seq. (2004).

elections, *see* American Bar Association Standing Committee on Judicial Independence, *Public Financing of Judicial Campaigns*, Feb. 2002,and public funding for at least some judicial races is in place in New Mexico and Wisconsin,[16] and many other states are currently considering public funding proposals.[17] Many of these public funding schemes are modeled on the North Carolina law and contain rescue funds and onerous disproportionate reporting requirements.[18]

Because a Circuit split exists as to whether rescue funds and the disproportionate reporting requirements that accompany such funds can be constitutionally employed in public financing schemes, *see infra*, legislators lack guidance on how to structure any such public funding scheme consistent with the First Amendment. And where such proposals have or will be adopted, privately funded candidates and independent groups may find their rights to freedom of speech and association impermissibly abridged.

II. The Fourth Circuit's Decision to Uphold North Carolina's Rescue Funds Conflicts With the Decisions of this Court and of Other Circuits.

A. The Rescue Funds Burden Core Political Speech.

North Carolina's rescue funds provide a publicly

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[16] *See* N.M. Stat. § 1-19A-13(I); Wis. Stat. Ann. § 11.001 et seq. (West 2004).

[17] *See, e.g.*, H.B. 251 (Id. 2003); H.B. 4610 (Ill. 2006); S.B. 171 (Wis. 2007).

[18] *See, e.g.*, N.M. Stat. § 1-19A-14.

funded candidate additional government funding in proportion to the "excess" expenditures made by her privately funded opponent, combined with any independent spending supporting her, when such expenditures exceed the publicly funded candidate's initial public funding disbursement. *Id.* at § 163-278.67(a).

In *Day*, 34 F.3d 1356, provisions of Minnesota's public funding scheme that afforded rescue funds for independent expenditures of third parties supporting the privately funded candidate was challenged. The Eighth Circuit found that these rescue funds burdened the First Amendment rights of groups making independent expenditures and struck down the scheme as a content-based burden that failed strict scrutiny. *Id.* at 1360-61. This Court in *Davis* specifically affirmed *Day*'s rationale that such a provision creates "a special and potentially significant burden." *Id.* at 2772.

The Fourth Circuit, however, rejected *Day*'s rationale and held that such a scheme did not burden Duke or IEPAC's free speech rights. App. 14a. It reasoned that the rescue funds provision did not amount to a cognizable First Amendment harm to Duke or IEPAC because the provision was not coercive. App. 16a. In so doing, the court below erred.

B. A Circuit Split Exists Regarding the Constitutionality of Rescue Funds.

Although this Court now endorsed *Day*'s rationale, other circuits have refused to follow it. To reach the conclusion that it did, the Fourth Circuit relied on a series of public financing cases that originated out of the First Circuit. App. 11a.

In *VoteChoice, Inc. v. DiStefano*, 4 F.3d 26 (1st Cir.

1993), the court reviewed Rhode Island's contribution "cap gap" that doubled the contributions a public-funding candidate could receive from a person or political action committee in a given year if triggered. *Id.* at 30. The court held that the cap gap was merely a part of Rhode Island's voluntary public funding scheme and that it did not burden speech because it neither penalized nor coerced candidates into participating in the public funding scheme. *Id.* at 39. The court disregarded the effect the provision had on privately funded opposing candidates, claiming that the "noncomplying candidate suffers no more than a countervailing denial" of a benefit and focusing instead on the "rough proportionality" of burdens and benefits on those who participate in the scheme. *Id.*

The First Circuit affirmed its *VoteChoice* rationale in *Daggett v. Comm'n on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), upholding Maine's public-funding scheme. *Id.* at 472. The scheme provided rescue funds to publicly funded candidates (made possible by reporting requirements of independent expenditures in excess of $50) and reduced contribution limits for privately funded candidates to between $250 and $500, depending on the office sought. *Id.* at 451-52. The court dismissed any adverse affect on the privately funded candidate, noting that the scheme "in no way limits the quantity of speech . . . nor . . . threaten[s] censure or penalty," *id.* at 464, and, instead, also focused on the voluntary nature of the scheme. *Id.* at 466-67.

Daggett expressly refused to adopt the rationale of *Day*, instead looking to a subsequent Eighth Circuit decision which the First Circuit thought discredited

Day. *Daggett*, 205 F.3d at 464. In *Rosenthiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), the court held that Minnesota's public funding scheme, with its $50 contribution refund to taxpayers giving to publicly funded, but not privately funded, candidates was not coercive and, thus, did not burden the First Amendment rights of the privately funded candidates. *Id.* at 1552-53. It distinguished *Day* on factual grounds and adopted the rationale of *VoteChoice*, contending that because the public funding scheme involved an exchange of voluntary restrictions for a benefit, it was not coercive. *Rosenthiel*. 101 F.3d at 1550-51.

Similarly, the Sixth Circuit in *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), adopted *VoteChoice*'s rationale to uphold Kentucky's $2-for-$1 matching provision for publicly funded candidates because the court could not determine whether the scheme was clearly coercive. *Id.* at 948-49.

These decisions of the First, Sixth, and Eighth Circuits, along with that of the Fourth Circuit below, are in conflict with *Day*. This conflict warrants a grant of certiorari.

C. The Rescue Funds Provision Fails Strict Scrutiny.

The present case, when analyzed within the proper framework of *Davis* and *Day*, clearly involves significant burdens on speech. The rescue funds provision affords publicly funded candidates with additional funds if privately funded candidates like Duke or entities like IEPAC decide to make campaign expenditures that trigger the provision. This places privately funded candidates in the circumstance of choosing

either to exercise their free speech rights and trigger rescue funds for their publicly funded opponent or to forgo their speech to avoid such an outcome. Entities like IEPAC are likewise placed in the position of independently advocating for a privately funded candidate and ensuring additional funding for her publicly funded opponent or forgoing its speech to prevent triggering such funds. In the present case, IEPAC chose not to speak. AC 36. Duke initially chose not to speak, but later determined to speak despite the rescue funds provisions. Duke Aff. ¶ 4. Under *Davis* and *Day*, this amounts to a cognizable burden on Duke and IEPAC's speech rights and triggers First Amendment scrutiny.

Once a cognizable First Amendment burden has been established, the analysis continues under strict scrutiny. *Davis,* 128 S. Ct. at 2772. To survive such scrutiny, the rescue funds provision must be narrowly tailored to serve a compelling interest. *Id.*

The purpose of North Carolina's public financing scheme is to promote "fairness of democratic elections" and to minimize potential corruptive effects of "large amounts of money being raised and spent to influence the outcome of elections." N.C. Gen. Stat. § 163-278.61. As to promoting the "fairness of democratic elections," the "fairness" contemplated here is the fact that the rescue funds attempt to equalize the financial resources of the candidates involved. However, equalizing candidate spending is not a compelling governmental interest. *Davis*, 128 S. Ct. at 2773-74.[19]

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[19]Even if such an interest were compelling, the rescue funds provision does not serve this interest because it does

Regarding the purported purpose to minimize potential corruptive effects of "large amounts of money being raised and spent to influence the outcome of elections," this Court has already held that the way to limit the potential corruptive effect of raising contributions is contribution limits, *Randall v. Sorrell*, 548 U.S. 230, 242 (2006) ("the Government's primary justification for expenditure limitations, preventing corruption and its appearance, was adequately addressed by the Act's contribution limitations and disclosure requirements"), and that candidate and independent spending poses no threat of corruption. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) ("independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions"); *see also id.* at 53 ("the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."); *Randall*, 548 U.S. at 248 (striking down Vermont's expenditure limits). Public funding schemes generally pass rational basis scrutiny. *Buckley*, 424 U.S. at 91 ("Whether the chosen means [public funding of elections] appear 'bad,' 'unwise,' or 'unworkable' to us is irrelevant. Congress has concluded that the means are "necessary and proper" to promote the general welfare, and we thus decline to find this legislation without the

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not include in its calculations funds spent opposing a privately funded candidate. N.C. Gen. Stat. § 163-278.66(a). The rescue funds provision is thus underinclusive and does not serve any interest in equality.

grant of power in Art. I, s 8"); *Davis*, 128 S. Ct. 2772 ("Congress 'may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations') (*citing Buckley*, 424 U.S. at 57, n.65). But rescue funds are afforded to combat non-corrupting spending of privately funded candidates and independent spenders, and thus does not serve an anti-corruption interest. The rescue funds might make public financing more enticing, but cannot do so without a compelling justification for the resulting burden it places on privately funded candidates and independent spenders. The rescue funds fails strict scrutiny.

III. The Disproportionate Reporting Requirements Conflict with Decisions of This Court.

The rescue funds provision depends on unilateral, compelled disclosures of privately funded candidates and independent spenders in order to function. This alone warrants a finding of their unconstitutionality under *Davis*, which held that disclosure requirements enacted to implement unconstitutional disproportionate contribution limits could not be justified on those grounds and, as such, were unconstitutional. *Davis*, 128 S. Ct. at 2775. Moreover, since the reporting requirements create burdens triggering strict scrutiny, which they fail, the reporting provisions should also have been deemed unconstitutional.

A. The Reporting Provision Burdens Core Political Speech.

The court below contended that the reporting provision "is not particularly burdensome." App. 19a.

Since that decision, the North Carolina legislature is in the final stages of revising certain aspects of the reporting provision, requiring privately funded candidates to report contributions, rather than expenditures, and leaving the expedited reporting schedules at the discretion of the election board.[20] Despite these changes, the reporting provisions still burden core political speech.

This Court has expressly recognized that disclosure provisions can burden speech, *Davis*, 128 S. Ct. at 2774-75 (*quoting Buckley*, 424 U.S. at 64) ("'[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'"), because compelled disclosure undermines the privacy of private association and potentially subjects those associated with the group to harassment. *Buckley*, 424 U.S. at 64-66. Furthermore, compelled disclosure of "confidential internal materials" violates privacy rights and "seriously interferes with internal group operations and effectiveness." *AFL-CIO v. FEC*, 333 F.3d 168, 177-78 (D.C. Cir. 2003); *see also Davis*, 128 S. Ct. at 2768 (holding that plaintiff had standing to challenge a mandatory disclosure provision where he "faced the imminent threat" of having to make disclosures under the provision).

The reporting requirements here impose two distinct burdens on a privately funded candidate and an independent spender's free speech rights to privacy and effective advocacy. These burdens are unilateral, since nothing comparable is required of publicly funded candidates.

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[20] *See* Senate Bill 1263, Section 10.2(a), *supra* note 2.

First, the privately funded candidate and independent spenders are burdened by the 24-hour reporting requirements. Within 24 hours after privately funded candidates receive contributions or entities make an independent expenditure that exceeds the threshold percentage of the trigger amount, they must file a report. N.C. Gen. Stat. § 163-278.67(a). They are then subject to an expedited reporting schedule, reporting in increments of $1,000 under the current law, or at the discretion of the election board under the recent revision. *Id.* These unilateral reports are in addition to normal reporting requirements. *Id.* at § 163-278.9.

Second, the privately funded candidate and independent spenders are burdened with heightened recordkeeping and reporting not required of publicly funded candidates or independent spenders opposing privately funded candidates. The requirement to file such reports on an expedited basis can be especially problematic because, whether such reporting is at the too-low threshold of $1,000 or at the discretion of the election board, the reporting provision requires continuous, contemporaneous reporting. Staff must be hired to do this burdensome compliance, which requires a substantial amount of time, and for which there are penalties for late or missing reports. *Id.* at § 163-270.

These two distinct burdens—in addition to the more general burden of compelled disclosure itself, with the concomitant loss of privacy–trigger strict scrutiny.

B. The Reporting Provision Fails Strict Scrutiny.

In analyzing the reporting provision, the lower

court declined to apply strict scrutiny. The court believed that *Buckley* and *McConnell v. FEC*, 540 U.S. 93 (2003), did not require strict scrutiny for disclosure requirements, and that the reporting requirements had a substantial relationship to an informational interest, an anti-corruption interest, and a data-collecting interest, because the reporting requirements enabled "the effective administration of matching funds" and thus passed intermediate scrutiny. App. 19a. This is contrary to *Davis*.

The *Davis* Court expressly states that "we have closely scrutinized disclosure requirements, including requirements governing independent expenditures made to further individuals' political speech," noting that "[t]o survive this scrutiny, significant encroachments 'cannot be justified by a mere showing of some legitimate governmental interest.'" *Davis*, 128 S. Ct. at 2775 (*quoting Buckley*, 424 U.S. at 64). Because the reporting provision burdens the speech of both candidates and third parties in at least two material ways, it amounts to a "significant encroachment" on their speech rights that warrants strict scrutiny review.

Under such review, the reporting provision fails. These unilateral compelled disclosures are clearly designed to implement the rescue funds provision, which is unconstitutional, which renders the reporting provision unconstitutional. *See Davis*, 128 S. Ct. at 2775 ("The § 319(b) disclosure requirements were designed to implement the asymmetrical contribution limits provided for in § 319(a), and as discussed above, § 319(a) violates the First Amendment. In light of that holding, the burden imposed by the § 319(b) requirements cannot be justified, and it follows that they too

are unconstitutional.").

Furthermore, as the court below correctly recognized, general disclosure requirements that apply to all candidates, e.g., quarterly reports of contributions and expenditures and special pre-election reports, were approved in *Buckley* on the basis of three interests advanced by disclosure: (1) informing the electorate, (2) deterring corruption, and (3) collecting data to detect violations of contribution limits. *Buckley*, 424 U.S. at 66-68. None of these interests are applicable to support the special disproportionate reporting imposed here.

The first interest, the informational interest, is not cognizable because the required reporting is underinclusive as to that interest. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[T]he Court need not decide whether achieving "impartiality" (or its appearance) in the sense of openmindedness is a compelling state interest because, as a means of pursuing this interest, the announce clause is so woefully underinclusive that the Court does not believe it was adopted for that purpose."); *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (Where considerable First Amendment freedoms are at stake, a state must "demonstrate its commitment to advancing [its] interest by applying its [requirements] evenhandedly."). While the privately funded candidate and independent spenders supporting privately funded candidates must file reports within 24 hours of receiving contributions or making independent expenditures, publicly funded candidates and organizations making independent expenditures opposing privately funded candidates are not required to promptly report their spending. Indeed, independent expenditures made

opposing a privately funded candidate need not be reported at all. N.C. Gen. Stat. § 163-278.66(a). And while the privately funded candidate must file expedited reports, publicly funded candidates are only subject to normal reporting requirements. *Id.* If the North Carolina legislature had a genuine interest in providing the public with the information that these extremely prompt reporting requirements provide, the same sort of reporting would be required of all candidates and independent spenders. That North Carolina does do this undermines any claim that the interest in informing the public justifies the provision.

In any event, the public will receive full information about candidate campaign contributions and expenditures in the less-restrictive quarterly and pre-election reports that both candidates must file, *id.* at § 163-278.9, so the special, unilateral reporting requirements are redundant and unnecessary. Any asserted informational interest would be "insubstantial because voters may identify [the relevant information] under [other] provisions." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298-99 (1981). "It is clear, therefore, that [the challenged disclosure provision] does not advance a legitimate governmental interest significant enough to justify its infringement of First Amendment rights." *Id.* at 299.

The second interest, deterring corruption, is also not applicable to the reporting provision because, as noted above, candidate campaign and independent spending poses no risk of corruption. But the reporting provision is also underinclusive. There is nothing that suggests that those who oppose a privately funded candidate are uniquely immune from exercising

corruptive influences, but they are not subject to the special reporting requirements. This underinclusiveness undermines the court's reliance on this interest.

Finally, the third interest in collecting data to detect violations of contribution limits is not applicable because none of the data required to be reported has any application to detecting circumvention of contribution limits. With regard to candidates, this interest is adequately served by the less-restrictive quarterly and pre-election reports that both candidates must file, N.C. Gen. Stat. § 163-278.9. And requiring reports from entities based on independent expenditures, or from candidates based on contributions made out of personal funds does not advance this interest at all.

As a result, the court below erred in upholding the reporting provision and this Court should grant the writ to correct this error.

Conclusion

For the foregoing reasons, this Court should grant the writ, vacate and remand this matter to the Fourth Circuit for reconsideration in light of this Court's decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008), or, in the alternative, grant the writ and decide this case on the merits.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT POLITICAL EXPENDITURES; NORTH CAROLINA STATE POLITICAL ACTION COMMITTEE; W. RUSSELL DUKE, JR., *Plaintiff-Appellant*, *v.* LARRY LEAKE, IN HIS OFFICIAL CAPACITY AS THE CHAIRPERSON OF THE NORTH CAROLINA BOARD OF ELECTIONS; ET AL., *Defendants-Appellees.* [a complete list of Defendants is furnished in the Petition's Parties to Proceedings Section]	No. 07-1454 D.C. No. 5:06-CV-00324-BR OPINION

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Raleigh.
W. Earl Britt, Senior District Judge

Argued: December 7, 2007

Decided: May 1, 2008

Before MICHAEL and TRAXLER, Circuit Judges, and James P. JONES, Chief United States District Judge for the Western District of Virginia, sitting by

designation.

Affirmed by published opinion. Judge Michael wrote the opinion, in which Judge Traxler and Judge Jones joined.

[Counsel statements omitted]

OPINION

MICHAEL, Circuit Judge:

The plaintiffs, a former candidate for the North Carolina Supreme Court and two political action committees, challenge the constitutionality of three provisions of North Carolina's Judicial Campaign Reform Act, N.C. Sess. Laws 2002-158, codified at N.C. Gen.Stat. § 163-278.61 et seq. (the Act). The Act, which became law in 2002, creates a system of voluntary public financing for judicial candidates at the appellate level. The district court denied the plaintiffs' request for a preliminary injunction prior to the 2006 general election and ultimately dismissed the complaint for failure to state a claim. Because we conclude that the challenged provisions are permissible campaign finance regulations and are consistent with the First Amendment, as interpreted by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), we affirm.

I.

North Carolina's Judicial Campaign Reform Act creates a system of optional public funding for candidates seeking election to the state's supreme court and

court of appeals. The Act's stated purposes are to "ensure the fairness of democratic elections" and "to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of [judicial] elections." N.C. Gen.Stat. § 163-278.61. To further these purposes, the Act creates the North Carolina Public Campaign Fund (the Fund), which distributes public funds to eligible candidates who choose to participate in the system (participating candidates). *Id.* In exchange for the public funds, participating candidates must agree to abide by restrictions on the amount of contributions they accept and the amount of campaign expenditures they make. Those candidates who decline participation (nonparticipating candidates) do not receive public funding and are not bound by the additional restrictions accepted by participating candidates.

In August 2005 the plaintiffs filed an action in U.S. District Court in North Carolina against several state officials connected with the administration and enforcement of the Act (collectively, the state). The complaint asserted that several provisions of the Act were unconstitutional. On October 26, 2006, shortly before the November 2006 general election, the district court denied the plaintiffs' request for a preliminary injunction, reasoning that the plaintiffs were not likely to succeed on any of their constitutional claims. In March 2007 the court dismissed the plaintiffs' claims for failure to state a claim. The plaintiffs appeal the dismissal order, and our review is de novo, *Smith v. Frye*, 488 F.3d 263, 266 (4th Cir.2007).

II.

We begin our review by setting forth the particulars of North Carolina's public financing system for judicial campaigns at the appellate level.

As a threshold matter any candidate seeking to participate in the public funding system must meet two statutory conditions. First, the candidate must satisfy the Act's eligibility requirements, which are designed to measure whether the candidate has a base of support in the electorate. *See* N.C. Gen.Stat. § 163-278.64(b). Specifically, a candidate must collect "qualifying contributions" from at least 350 registered voters, and those contributions must total at least thirty but no more than sixty times the filing fee for the office. *Id.* In 2006 a supreme court candidate needed to raise between $37,140 and $74,280.[1] Second, each participating candidate must agree to certain restrictions on campaign fundraising and expenditures, including a limitation of spending to the total of the amounts disbursed from the Fund plus the amounts raised as qualifying contributions. *Id.* § 163-278.64(d).

After satisfying these two conditions, a participating candidate becomes certified to receive public funds. A certified candidate receives an automatic (base)

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[1]These numbers, as well as others throughout the opinion, are calculated based on record information suggesting that the filing fee for a supreme court race in 2006 was $1,238. Our numbers differ slightly from those offered by the plaintiffs, but the difference does not affect the outcome of the case.

disbursement of public funds if the candidate is opposed in the general election. *Id.* § 163-278.65(b). In 2006 the base amount of funding for a contested state supreme court campaign was $216,650, which equaled 175 times the filing fee for that office. A certified candidate does not receive an automatic disbursement of funds for a primary election, but the candidate may spend in a primary the amounts raised to satisfy the statute's eligibility requirements.

Participating candidates are also eligible to receive "matching funds" in specified circumstances.[2] *Id.* § 163-278.67. Eligibility for these funds is triggered when a participating candidate is opposed by a nonparticipating candidate whose "funds in opposition" total more than the trigger amounts specified in the statute. "Funds in opposition" is defined to include the amount any one nonparticipating candidate has raised or spent (whichever is greater) plus the amount that independent entities have spent to support the nonparticipating candidate or to oppose the participating candidate. Id. § 163-278.67(a).

The Act provides separate trigger amounts for a primary and general election. In a primary election the trigger amount is defined as sixty times the filing fee

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[2]A recent amendment substituted the term "matching funds" for "rescue funds," which was used in the original version of the Act. *Act to Strengthen the Matching Funds Provision of the Judicial Public Campaign Act*, N.C. Sess. Laws 2007-510, § 1(a)-(c). This substitution has no effect on the substance of the Act.

for the office sought, id. §§ 163-278.62(9), (18); in 2006 the trigger equaled $74,280 for a supreme court campaign. In a general election the trigger amount is equal to the initial disbursement, § 163.278.62(18), which in 2006 was $216,650 for a supreme court campaign. The amount of matching funds disbursed equals the amount by which the nonparticipating candidate's "funds in opposition" exceed the trigger amount, though in both the primary and the general the total amount of matching funds available is capped at two times the trigger amount. *Id.* § 163-278.67(a)-(c).

The Act contains several additional provisions designed to promote the effective administration of the matching funds scheme. For example, a nonparticipating candidate must make an initial report within twenty-four hours after the "total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for matching funds." *Id.* § 163-278.66(a). The report must include the campaign's "total income, expenses, and obligations." *Id.* In addition, entities that make independent expenditures supporting a nonparticipating candidate (or supporting or opposing a participating candidate) must file a similar report within twenty-four hours of making total expenditures in excess of $5,000. Id. After these initial reports, the candidates and independent entities must "comply with an expedited reporting schedule by filing additional reports" after receiving (or spending) each additional amount in excess of $1,000. *Id.* § 163-278.66(a).

Finally, in certain defined circumstances the Act bars a nonparticipating candidate from accepting contributions from third parties during the twenty-one days prior to a general election. *Id.* § 163-278.13(e2)(3). The purpose of this ban is "to make meaningful the provisions" of the Act by ensuring the timely distribution of matching funds. *See id.* § 163-278.13(e2). For this reason, the ban applies only if a nonparticipating candidate is opposing a participating candidate, and it applies only to contributions that would cause the nonparticipating candidate to exceed the trigger amounts. *Id.* § 163-278.13(e2)(3). The ban does not prevent nonparticipating candidates from personally contributing or loaning money to their own campaigns. *Id.* § 163-278.13(e2).

III.

Before reaching the merits, we must consider the state's arguments that the plaintiffs' claims are not justiciable.

A.

The state argues that two of the plaintiffs-North Carolina Right to Life Committee Fund for Independent Political Expenditures (NCRL-IEPAC or the Independent Expenditure PAC) and North Carolina Right to Life State Political Action Committee (NCRL-SPAC or the Contribution PAC)-lack standing because neither has been injured by the statutory provisions they challenge. Three elements are necessary for standing: (1) the plaintiffs must allege that they have suffered an injury in fact, that is, "an actual or threatened injury that is not conjectural or hypothet-

ical"; (2) the injury must be "fairly traceable to the challenged conduct"; and (3) it must be likely that the injury will be redressed by a favorable decision. *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir.2006) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The state contends that the plaintiffs have not satisfied the first (injury in fact) requirement.

According to the complaint, NCRL-IEPAC is a political action committee organized for the purpose of making independent expenditures on behalf of political candidates it supports. NCRL-IEPAC alleges that it chose not to make expenditures on behalf of nonparticipating candidates due to a fear that such expenditures might result in the disbursement of matching funds to a participating candidate that the organization opposed. NCRL-SPAC, by contrast, is a political action committee organized for the purpose of contributing money to political candidates it supports. NCRL-SPAC alleges that it would have made contributions to a nonparticipating candidate during the twenty-one days prior to the 2006 general election, but refrained from doing so because of the Act.

The state argues, in essence, that the two organizations' alleged injuries are hypothetical or conjectural rather than actual or imminent. According to the state, the organizations failed to show that they would have actually carried out their plans to make contributions and expenditures. Specifically, the state contends that the Independent Expenditure PAC (NCRL-IEPAC) did not show that it had sufficient funds available to make independent expenditures in amounts that would have

triggered the statutory reporting requirements. Similarly, the state questions the Contribution PAC's (NCRL-SPAC's) intent to make contributions during the twenty-one days prior to the 2006 election. In particular, the state points out that the Contribution PAC has not made any contributions to candidates during previous election cycles, including 2006.

The state's arguments lack merit. We have held that a plaintiff may establish the injury necessary to challenge campaign finance regulations by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 386 (4th Cir. 2001) (*quoting Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). Similarly, the Supreme Court has held that "conditional statements" of intent, which allege that a plaintiff would engage in a course of conduct but for the defendants' allegedly illegal action, may be sufficient to demonstrate the required "injury in fact." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The Court explicitly rejected the argument (comparable to the state's argument here) that such conditional statements of intent are too speculative to confer standing. Id. In this case NCRL-IEPAC and NCRL-SPAC have sufficiently stated their intentions by alleging that they would have made contributions and expenditures but for the challenged provisions. Thus, we conclude that the plaintiffs' allegations are sufficient to establish standing.

B.

The state also argues that the plaintiffs' claims are moot. The third plaintiff, W. Russell Duke, Jr., was a candidate for the state supreme court when this action was filed, and he opted not to receive public funds. Duke ultimately lost the election to the incumbent chief justice, Sarah Parker, who chose to participate in the public financing system. The state argues that Duke's claims are moot because he has not alleged that he will become a candidate for judicial office again in the future. Likewise, according to the state, the claims raised by NCRL-IEPAC and NCRL-SPAC are moot because neither organization has alleged an intent to participate in future election cycles.

We disagree. Duke's claims, as well as those raised by NCRL-IEPAC and NCRL-SPAC, "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wis. Right to Life, Inc. (WRTL)*, --- U.S. ----, 127 S.Ct. 2652, 2662, 168 L.Ed.2d 329 (2007). In WRTL the Supreme Court held that the "capable of repetition, yet evading review" doctrine applied to save a challenge to the constitutionality of the Bipartisan Campaign Reform Act (BCRA) made during the 2004 election cycle. *Id.* at 2662-63. Although the election was over when the case reached the Supreme Court, the Court held that there was a reasonable expectation that the BCRA provisions applied against the plaintiff during the 2004 cycle would be applied against it again in future elections. *Id.* Likewise, in this case, there is a reasonable expectation that the challenged provisions will be applied against the plaintiffs again during

future election cycles. In making this determination, we reject, as other circuits have, the argument that an ex-candidate's claims may be "capable of repetition, yet evading review" only if the ex-candidate specifically alleges an intent to run again in a future election. *See Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir.2000); Merle v. United States, 351 F.3d 92, 95 (3d Cir.2003); *see also Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473, 111 S.Ct. 880, 112 L.Ed.2d 991 ("[E]ven though [the respondent]*436 lost the election [for a labor union office] by a small margin, the case is not moot. Respondent has run for office before and may well do so again."). Thus, we conclude that the plaintiffs' claims are not moot.

IV.

We turn now to the central issue: whether providing public matching funds to participating candidates violates the First Amendment.

A.

Our analysis must begin with the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The Court made clear in *Buckley* that public financing of political campaigns does not, in itself, violate the First Amendment. 424 U.S. at 57 n. 65, 96 S.Ct. 612. In fact, the Court observed that the Federal Election Campaign Act's (FECA's) public financing scheme "furthers, not abridges, pertinent First Amendment values" because it "facilitate[s] and enlarge[s] public discussion and participation in the electoral process, goals vital to a self-governing people." Id. at 92-93, 96 S.Ct. 612.

Since *Buckley* the circuit courts have generally held that public financing schemes are permissible if they do not effectively coerce candidates to participate in the scheme. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 466-72 (1st Cir.2000); *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir.1998); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1549-52 (8th Cir.1996); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 38-39 (1st Cir.1993). A public financing system that effectively mandates participation (and thus effectively prohibits candidates from spending their own funds) would violate Buckley's holding that mandatory limits on the amount a candidate can spend on his own campaign are unconstitutional. *Gable*, 142 F.3d at 948; *see also Buckley*, 424 U.S. at 57 n. 65, 96 S.Ct. 612 ("Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." (emphasis added)). Nonetheless, courts recognize that a public financing system may provide significant incentives for participation without crossing the line into impermissible coercion. *E.g.*, *Gable*, 142 F.3d at 949.

The plaintiffs do not make coercion a central aspect of their arguments, and, indeed, we conclude that North Carolina's public financing system is not unconstitutionally coercive. The incentives to choose public funding, while not insubstantial, are rather modest in comparison to those in similar systems that have been upheld against First Amendment challenges. For instance, the Sixth Circuit upheld a Kentucky campaign finance system that provides a substantially greater advantage to participating candidates than

does the North Carolina system. *See Gable*, 142 F.3d at 948-49. Under Kentucky's system a participating candidate can raise up to $600,000 in contributions, which are then matched two-to-one with public dollars for a total cap on campaign expenditures of $1.8 million. *Id.* at 944. If, however, a nonparticipating candidate raises more than $1.8 million, the cap is removed and every dollar in contributions received by the participating candidate is again matched with two additional public dollars. *Id.* The Sixth Circuit reasoned that a candidate could make a "financially rational decision not to participate" in the system only if the candidate "intends to exceed the $1.8 million threshold and believes he will raise more than three times the funds his participating opponents can raise." *Id.* at 948. Nonetheless, the court held that the significant "incentives for participation" did not "step over the line of unconstitutional coercion." *Id.* at 949.

Unlike the Kentucky system at issue in *Gable*, the matching funds provided by North Carolina are given in a one-to-one ratio and are subject to a cap equal to twice the initial trigger amount, which for a 2006 supreme court campaign was $216,650. The incentive to opt for this limited level of public funding (a maximum of $649,950 for a 2006 supreme court general election campaign) is far from unconstitutional coercion, especially in light of the fact that judicial campaigns in several other states have raised and spent multiple millions of dollars. *See* Br. Amici Curiae of Ten Organizations Concerned About the Influence of Money on Judicial Integrity, Impartiality, and Independence, at 5-9; *see also Daggett*, 205 F.3d at 466-472 (upholding public financing system as non-coercive);

Vote Choice, 4 F.3d at 38-39 (same).

B.

The thrust of the plaintiffs' First Amendment argument against the matching funds provision is that it "chill[s] and penalize[s] contributions and independent expenditures made on behalf of [nonparticipating] candidates." Appellants' Br. at 32. The plaintiffs argue that their political speech is chilled because spending in excess of the specified trigger results in public funds being disbursed to a participating candidate whom the plaintiffs do not support. Therefore, according to the plaintiffs, they choose to spend less money (and thus engage in less political speech) in order to prevent candidates they oppose from receiving public funds.

There is some conflict in the circuits as to whether the provision of matching funds burdens or chills speech in a way that implicates the First Amendment. The Eighth Circuit struck down a matching funds provision, reasoning that the potential "self-censorship" created by the scheme "is no less a burden on speech ... than is direct government censorship." *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir.1994). The First Circuit, on the other hand, explicitly rejected the "logic of *Day*" by holding that the provision of matching funds "does not create a burden" on the First Amendment rights of nonparticipating candidates or independent entities. *Daggett*, 205 F.3d at 464-65; *see also Gable*, 142 F.3d at 947-49 (Sixth Circuit upholding a matching funds scheme against a constitutional challenge without addressing the *Day* analysis).

We conclude that the state's provision of matching funds does not burden the First Amendment rights of nonparticipating candidates (like plaintiff Duke) or independent entities (like plaintiff NCRL-IEPAC) that seek to make expenditures on behalf of nonparticipating candidates. The plaintiffs remain free to raise and spend as much money, and engage in as much political speech, as they desire. They will not be jailed, fined, or censured if they exceed the trigger amounts. The only (arguably) adverse consequence that will occur is the distribution of matching funds to any candidates participating in the public financing system. But this does not impinge on the plaintiffs' First Amendment rights. To the contrary, the distribution of these funds "furthers, not abridges, pertinent First Amendment values" by ensuring that the participating candidate will have an opportunity to engage in responsive speech. *See Buckley*, 424 U.S. at 92-93, 96 S.Ct. 612.

In reaching this conclusion, we reject as unpersuasive the Eighth Circuit's decision in *Day*, which concluded that a matching funds scheme created an impermissible chilling effect on speech. *Day*'s key flaw is that it equates the potential for self-censorship created by a matching funds scheme with "direct government censorship." *See Day*, 34 F.3d at 1360. *Day* attempts to support this flawed proposition with a citation to a Supreme Court case that addresses the danger of self-censorship that occurs when a licensing statute gives government officials unbridled discretion to permit or deny expressive activity. *Id.* (*citing City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)).

The principle underlying the Lakewood case, however, has no application in the context of a matching funds provision. In *Lakewood* the Supreme Court was concerned that speakers would be chilled from expressing criticism of a mayor because a city ordinance gave the mayor broad discretion in granting or denying permits to place news racks on city sidewalks. This danger, according to the Court, justified striking down the licensing scheme, which lacked clear standards. 486 U.S. at 759-60, 108 S.Ct. 2138. In the case before us, however, the chilling effect alleged by the plaintiffs is different in kind because it stems not from any fear of direct government censorship but rather from the realization that one group's speech will enable another to speak in response. In stark contrast to the licensing scheme challenged in Lakewood, North Carolina's provision of matching funds is likely to result in more, not less, speech.

Moreover, the *Day* decision appears to be an anomaly even within the Eighth Circuit, as demonstrated by that court's later decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir.1996), which upheld a Minnesota campaign finance regulation. A candidate who opts to participate in Minnesota's public financing system must agree to a specified cap on the amount the campaign can spend. However, the cap amount is waved if the participating candidate faces a nonparticipating opponent who raises (or spends) amounts exceeding specified thresholds. 101 F.3d at 1546-48. Had the Eighth Circuit employed the Day analysis in the manner the plaintiffs seek to apply it here, the court would have concluded that the provision created a danger of self-censorship because a nonparticipating

candidate might choose to limit expenditures in order to ensure that the participating candidate is not released from the expenditure limitations. But, despite a dissent that expressly invoked Day' s "chilling effect" proposition, the court majority upheld the Minnesota provision and reasoned that the provision did not burden a nonparticipating candidate's First Amendment rights. 101 F.3d at 1549-53; *id.* at 1561-62 (Lay, J., dissenting). This outcome, which demonstrates the Eighth Circuit's inconsistent application of the *Day* analysis, provides additional support for our determination that *Day* is simply unpersuasive.

C.

In sum, we conclude that North Carolina's provision of matching funds under § 163-278.67 does not violate the First Amendment because the Act does not coerce candidates into opting into the public financing system. We reject the plaintiffs' argument that the chilling effect allegedly caused by § 163-278.67 makes the statute unconstitutional. To the extent that the plaintiffs (or those similarly situated) are in fact deterred by § 163-278.67 from spending in excess of the trigger amounts, the deterrence results from a strategic, political choice, not from a threat of government censure or prosecution. As the First Circuit observed in *Daggett*, the First Amendment gives the plaintiffs neither a "right to outraise and outspend an *439 opponent" nor a "right to speak free from response." 205 F.3d at 464.

V.

The plaintiffs next argue that § 163-278.66(a)'s report-

ing requirements are unconstitutional. The section contains two basic requirements. First, nonparticipating candidates are required to file a report within twenty-four hours of raising or spending funds in excess of eighty percent of the trigger amount; independent entities must file a similar report after spending more than $5,000 in opposition to a participating candidate. Second, after this initial report is filed, the candidates and independent entities must disclose each additional amount received (or spent) in excess of $1,000 through additional reports filed under "an expedited reporting schedule."

Reporting and disclosure requirements in the campaign finance realm "must survive exacting scrutiny." *Buckley*, 424 U.S. at 64, 96 S.Ct. 612. The plaintiffs argue that "exacting scrutiny" in this context is equivalent to strict scrutiny (requiring narrow tailoring to a compelling state interest), but this argument is inconsistent with Buckley and subsequent cases. In *Buckley* the Supreme Court held that there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." 424 U.S. at 64, 96 S.Ct. 612. In applying this test, the Court upheld a FECA disclosure requirement that bore a "sufficient relationship to a substantial governmental interest." 424 U.S. at 80, 96 S.Ct. 612. Likewise, the Court recently upheld BCRA's disclosure requirements based on its determination that the requirements advanced "important state interests." *McConnell v. FEC*, 540 U.S. 93, 196, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). In doing so, the Court did not engage in the type of narrow tailoring analysis that the plaintiffs ask us to

apply to the disclosure requirements at issue in this case. *See id.* at 194-202, 124 S.Ct. 619.

The plaintiffs also miss the mark with their argument that the state could advance its interests in a less burdensome manner. Because narrow tailoring is not required, the state need not show that the Act achieves its purposes in the least restrictive manner possible. In *Buckley*, for example, the Supreme Court rejected an argument that FECA's $10 and $100 thresholds for disclosure of contributions were unconstitutionally low. 424 U.S. at 82-84, 96 S.Ct. 612. The Court reasoned that it could not "require Congress to establish that it has chosen the highest reasonable threshold" that would still achieve the government's interests. *Id.* at 83, 96 S.Ct. 612. Likewise, our task here is to determine whether North Carolina's disclosure requirements have a "substantial relation" to the state's purposes, not to determine whether they are the least restrictive means of advancing those interests.

Moreover, the plaintiffs' arguments regarding the burdensome nature of § 163-278.66(a) are unfounded. For instance, the plaintiffs complain that § 163-278.66(a) is too burdensome because an initial report must be filed within twenty-four hours after certain threshold spending limits are exceeded. But in *McConnell* the Supreme Court upheld a nearly identical provision that required a report to be filed within twenty-four hours of the date on which expenditures exceeded a trigger amount. 540 U.S. at 195-96, 124 S.Ct. 619. The plaintiffs fare no better with their argument that § 163-278.66(a) is too burdensome because it requires nonparticipating candidates to file an excessive number of reports. The provision autho-

rizes the state board of elections to develop a schedule for the filing of reports. § 163-278.66(a). In 2006, for example, the board set a schedule that required eight reports to be filed during the two-and-a-half-month period preceding the election. Compliance with this schedule is not particularly burdensome. And, while the plaintiffs are correct that the board could impose a more burdensome schedule in future elections, that possibility alone is not a sufficient basis to strike down the statute at this time.

In sum, the plaintiffs' arguments against the reporting requirements lack merit. As in *Buckley* and *McConnell* the requirements advance three important state interests: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196, 124 S.Ct. 619. By ensuring the release of campaign funding information to the public and enabling the effective administration of matching funds, the reporting requirements clearly demonstrate a "substantial relation" to these interests. Because having a substantial relation to an important state interest is all that is required by *Buckley* and *McConnell*, § 163-278.66(a) passes constitutional muster.[3]

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[3]The plaintiffs also argue that § 163-278.66(a) is overbroad because it requires the reporting of "obligations made" for future expenditures. Because the reporting of a campaign's future obligations does not encroach on protected speech any more than the reporting of past expenditures, this argument fails as

VI.

Finally, the plaintiffs challenge § 163-278.13(e2)(3)'s ban on contributions during the twenty-one days prior to an election. Their central argument is that the twenty-one-day ban cannot withstand strict scrutiny because it is not narrowly tailored to a compelling state interest. The plaintiffs contend first that the stated purpose of the ban, which is to promote the effective administration of the matching funds provisions, is not a compelling interest. Alternatively, they argue that the ban is not narrowly tailored to its stated purpose because it does not bar a nonparticipating candidate from contributing to his own campaign, nor does it bar an independent entity from making expenditures supporting the candidate.

Once again the plaintiffs err in asserting that strict scrutiny applies. In *McConnell* the Supreme Court clearly reiterated that its past cases had subjected restrictions on campaign contributions to less intense scrutiny than restrictions on campaign expenditures. 540 U.S. at 134, 124 S.Ct. 619. Rather than applying strict scrutiny, the Court clarified that "a contribution limit involving even significant interference with associational rights is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." 540 U.S. at 136, 124 S.Ct. 619 (internal quotation marks omitted). Because the contribution ban interferes with associational rights by restricting the time frame during which contributions may be made and received, it must

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well.

satisfy McConnell's lesser standard of being "closely drawn to match a sufficiently important interest." *See id.*

The Act's twenty-one-day contribution ban survives scrutiny under *McConnell.* The ban advances the state's interest in avoiding the danger of corruption (or the appearance thereof) in judicial elections. The ban advances this interest because it is a key component of the state's public funding system, which is itself designed to promote the state's anti-corruption goals. The Sixth Circuit has upheld a similar ban that covered the twenty-eight days before an election. Noting that the ban forced candidates to "rearrange their fundraising by concentrating it in the period before the 28-Day Window begins," the court reasoned that this restriction was justified under *Buckley* by the state's interest in combating corruption through the use of a public funding scheme. *Gable*, 142 F.3d at 951.

The plaintiffs' alternative argument-that the ban is not sufficiently tailored to its stated goals because it does not cover either a candidate's own contributions or an independent entity's expenditures-also fails. As explained above, perfect tailoring is not required; rather, the ban need only be "closely drawn" to the asserted interest. *See McConnell*, 540 U.S. at 136, 124 S.Ct. 619. This standard is satisfied. A ban on contributions in the period immediately prior to the election helps to minimize a nonparticipating candidate's ability to unfairly take advantage of a participating candidate by delaying contributions until the last minute, when it would be too late for additional matching funds to be disbursed to the participating candidate. Moreover, the ban does not apply in all cases.

Instead, it applies only in elections in which a nonparticipating candidate faces a participating candidate. Even then, it applies only against contributions that would cause the nonparticipating candidate to exceed the trigger for matching funds. § 163-278.13(e2)(3). The narrowness of its application confirms that the ban is closely drawn to the asserted state interests.

In sum, we hold that § 163-278.13(e2)(3) survives constitutional scrutiny. Its ban on contributions from third parties during the twenty-one days prior to an election is a closely drawn means of advancing the state's interest in operating a public funding system to minimize the danger of corruption (or the appearance thereof) in judicial elections.

VII.

The State of North Carolina has created a system that provides optional public funding for candidates seeking election to the state's appellate courts. The purpose of the system is to protect North Carolina's citizens from "the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of [judicial] elections." N.C. Gen.Stat. § 163-278.61. The Act's public funding system is necessary, the state concluded, because the "effects [of money have been] especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts." *Id.* The concern for promoting and protecting the impartiality and independence of the judiciary is not a new one; it dates back at least to our nation's founding, when Alexander Hamilton wrote that "the complete independence of the courts of justice is peculiarly essential" to our form of government. The Federalist

No. 78, at 426 (E.H. Scott ed., 1898). We conclude that the provisions challenged today, which embody North Carolina's effort to protect this vital interest in an independent judiciary, are within the limits placed on the state by the First Amendment. Accordingly, the district court's judgment dismissing the plaintiffs' claims is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
E.D. NORTH CAROLINA, WESTERN DIVISION

BARBARA JACKSON, *et al.*, Plaintiffs, vs. LARRY LEAKE, *et al.*, Defendants.	Case No. 5:06-CV-324-BR October 26, 2006 **ORDER**

BRITT, SENIOR DISTRICT JUDGE.

This matter is before the court on plaintiffs' motion for a preliminary injunction. Defendants and intervenors filed revised briefs in opposition to the motion. Plaintiffs filed a revised reply. The issues have been fully briefed and are ripe for disposition.

I. BACKGROUND

As U.S. District Judge N. Carlton Tilley, Jr. recited when this case was before him:

> The facts in the light most favorable to the nonmoving party are as follows: In 2002, the North Carolina General Assembly created the North Carolina Public Campaign Financing Fund (the "Fund"). N.C. Gen.Stat. §§ 163-278.61 et seq. The Fund provides for a voluntary system of full public financing for campaigns for judicial positions on the North

Carolina Supreme Court and the North Carolina Court of Appeals. Id. § 163-278.61. In creating the Fund, the General Assembly sought to "ensure the fairness of democratic elections" and "protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of [judicial] elections, ... since impartiality is uniquely important to the integrity and credibility of the courts." *Id.* Candidates for judicial office may choose whether to participate in the Fund ("participating candidates") or to conduct privately financed campaigns ("nonparticipating candidates"). The North Carolina State Board of Elections (the "Board") is responsible for the administration of the Fund. *See id.* § 163-278.68(a) ("Enforcement by the Board.-The Board, with the advice of the Advisory Council for the Public Campaign Fund, shall administer the provisions of this Article.").

On August 8, 2005, Plaintiffs Barbara Jackson, W. Russell Duke, Jr., [North Carolina Right to Life Committee Fund for Independent Political Expenditures ("IEPAC")], and [North Carolina Right to Life State Political Action Committee ("SPAC")] filed suit challenging the constitutionality of certain provisions of the Fund and seeking both declaratory and injunctive relief. Specifically, Plaintiffs allege that the challenged provisions "violate the First and Fourteenth Amendments to the United States Constitution by unduly imping-

ing on protected speech and association...." (Am.Compl.¶ 1.) Plaintiffs challenge the constitutionality of N.C. Gen.Stat. §§ 163-278.66, 163-278.67, 163-278.13(e2)(3), and N.C. Gen.Stat. § 84-34. Briefly, these sections provide for the following: (1) Section 163-278.66 requires nonparticipating candidates to report campaign contributions or expenditures that exceed certain specified trigger amounts to the Board within 24 hours and any independent entities making expenditures in support of a nonparticipating candidate to make similar reports to the Board (the "reporting provision"); (2) Section 163-278.67 provides for "rescue funds" for participating candidates in the event the expenditures of a nonparticipating candidate (or of an independent entity in support of a nonparticipating candidate) exceed certain specified trigger amounts (the "rescue funds provision"); (3) Section 163-278.13(e2)(3) prohibits contributions to the campaign of any candidate during the period beginning 21 days before the general election and ending the day after the general election (the "21 day provision"); and (4) Section 84-34 requires every active member of the North Carolina State Bar to pay a $50 fee for the support of the North Carolina Public Financing Fund.

* * *

The Plaintiffs have named the following parties as Defendants in this case: (1) members of the North Carolina State Board of

> Elections, including Larry Leake, Chairperson of the North Carolina Board of Elections; (2) the Attorney General for the State of North Carolina; (3) the District Attorney for Wake County; (4) the District Attorney for Guilford County; and (5) members of the North Carolina Bar Administrative Committee, including M. Keith Kapp, Chairperson of the North Carolina Bar Administrative Committee.

Jackson v. Leake, No. 1:05-CV-691, 2006 WL 2264027, *1, 3 (M.D.N.C. Aug. 7, 2006) (footnotes omitted) (some alterations and omissions in original).

On 7 August 2006, Judge Tilley found that plaintiffs lack standing to assert their claims against the District Attorney for Guilford County and dismissed that district attorney as a defendant. *Id.* at *5-8. By virtue of that dismissal, no defendant is a resident of Guilford County, and accordingly, Judge Tilley found venue improper in the Middle District of North Carolina. *Id.* at *9-10. He ordered the transfer of the case to this district. *Id.* at *10. On 11 August 2006, the clerk for this district received notice of the transfer.

The undersigned noticed a status conference for its next term of court, 5 September 2006. During the status conference the court ruled on a number of motions and set a further, expedited briefing schedule on the remaining motions. Most significantly, the court allowed (1) Ronnie Ansley and Common Cause North Carolina's motion to intervene; (2) the North Carolina State Bar Administrative Committee members' motion pursuant to Fed. R. Civ. P. 20(b); and (3) plaintiffs to file a second amended complaint, if they desired. Plaintiffs filed an amended complaint on 12 September

2006. This complaint largely mirrors the first amended complaint before Judge Tilley. It does, however, make some changes to account for an amendment to the 21 day provision, § 163-278.13(e2)(3), which is discussed further below. The parties also filed additional briefs regarding plaintiffs' motion for preliminary injunction, plaintiffs' motion for class certification, and defendants' and intervenors' motions to dismiss.

II. DISCUSSION

At the outset, the courts notes, despite plaintiffs' request, a hearing on the instant motion is unnecessary given the additional briefing, the commencement of the 21-day period before the general election, and the fact that plaintiff Duke is a candidate in that election for Chief Justice of the North Carolina Supreme Court. Plaintiffs' motion to consolidate the hearing on their motion for preliminary injunction with a trial on the merits is therefore DENIED.

A. Standing

Because defendants have raised the issue of plaintiffs' standing as to all claims except the claim challenging § 84-34, (see Defs.' Revised Mem. Supp. Mot. to Dismiss at 5-7 & n. 2), and that issue is jurisdictional, *Emery v. Roanoke City School Bd.*, 432 F.3d 294, 298 (4th Cir.2005), the court addresses it first.

The doctrine of standing is an integral component of the case or controversy requirement. There are three components of constitutional standing: (1) the plaintiff must allege that he or she suffered an actual or threatened injury that is not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged conduct; and (3) a favorable decision must be likely to

redress the injury. The party attempting to invoke federal jurisdiction bears the burden of establishing standing. *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir.2006) (citations omitted).

Turning first to plaintiff Duke, as noted, he is currently a candidate for a North Carolina appellate court. He is a nonparticipating candidate opposing a participating candidate in this race. (Second Supp. Duke Aff. ¶ 3.)[1] Pursuant to § 163-278.67, rescue funds have been paid to his opponent's campaign, being "triggered by the fund raising conducted by [Duke] and reported by his political committee...." (Defs.' Revised Mem. Opp'n Mot. Prelim. Inj., Strach Decl. ¶ 7.) The Board has informed him that he is subject to the expedited reporting requirements of § 163-278.66. (Second Supp. Duke Aff. ¶ 3.) The 21-day period before the general election recently commenced. Under § 163-278.13(e2)(3), because rescue funds have been triggered and it does not appear that Duke's opponent has received the maximum rescue funds available, (*see* Defs.' Revised Mem. Opp'n Mot. Prelim. Inj., Strach Decl. ¶ 7), Duke cannot accept a contribution now and most likely until two days after the general election. Thus, Duke is currently being affected by and subjected to the statutory provisions he attacks, thereby, he claims, violating his First Amendment rights. Duke

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[1]Although defendants raise the standing issue in their motion to dismiss and the court refers to matters outside the pleadings, it is not necessary to convert the proceeding to one for summary judgment. See White Tail Park, Inc. v. Stroube, 413 F.3d 451, 458 (4th Cir.2005).

has sufficiently alleged an actual injury fairly traceable to the law he challenges. Duke seeks to have the challenged statutes declared unconstitutional and to permanently enjoin their enforcement. A favorable ruling would redress Duke's alleged injuries. Accordingly, Duke meets all the requirements for standing.

With respect to her claims challenging all statutes except § 84-34, plaintiff Jackson lacks standing. Although Jackson was a nonparticipating candidate in the 2004 election for the North Carolina Court of Appeals, (Second Am. Compl. ¶¶ 18, 24), she does not claim she suffered any injuries as a result of her prior campaign;[2] rather, her allegations rest on the fact "that [she] intends to run in 2012 to maintain her position in the North Carolina Court of Appeals," (*id.* ¶ 18), and "that in 2012, she may not participate in the public financing program," (*id.* ¶ 24). Jackson does not contend her decision to run in 2012, presumably as a nonparticipating candidate, impacts her now, such as in terms of campaign planning. *Cf.* Miller, 462 F.3d at 317-18 (finding plaintiffs, a Republican committee and its chairman, had standing to challenge open primary law although primary was nearly two years away-"Because campaign planning decisions have to be

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[2]In their revised brief in opposition to the motions to dismiss, plaintiffs state in 2004 Jackson "was subject to the challenged public financing provisions during her campaign as a nonparticipating candidate." (Br. at 3.) But, that fact does not necessarily mean she suffered an injury. Did she face a participating candidate? Were rescue funds even triggered? Was she required to make expedited reports?

made months, or even years, in advance of the election to be effective, the plaintiffs' alleged injuries are actual and threatened." (citation omitted)). Jackson has failed to meet the first requirement of standing as to her claims regarding §§ 163-278.12(e2)(3), 163-278.66, and 163-278.67, and the entire financing scheme, and those claims will be dismissed.

Plaintiff SPAC only challenges the 21 day provision. Its President testifies:

> [SPAC] intends to make contributions to a 2006 judicial campaign during the final 21 days before each respective election.... However, because of G.S. § 163-278.13(e2)(3), which makes it unlawful to make such a contribution, [SPAC] will not do so.

(Pls.' 12/22/05 Reply to Mot. Prelim. Inj., Holt Aff. ¶ 2.) At the time of this testimony, the former version of § 163-278.13(e2)(3) was in effect and prohibited contributions during the 21 days before the general election to a nonparticipating candidate opposed by a participating candidate who has not received the maximum rescue funds available. Despite the recent amendment to the statute, discussed below, the court finds this testimony is sufficient to show SPAC possesses standing to challenge the 21 day provision.

The other plaintiff political committee, IEPAC, challenges §§ 163-278.66(a) and 163-278.67. According to its President,

> [IEPAC] intends to make an independent expenditure of over $3000 during the 2006 judicial election cycle supporting a nonparticipating candidate or opposing a participating a

> candidate.... However, such an expenditure may provide the nonparticipating candidate's opponent with rescue funds and in effect finance that opponent's speech. G.S. § 163-278.67. Additionally, [IEPAC] will need to report within 24 hours their independent expenditure if it puts the nonparticipating candidate over 50% of the rescue fund trigger. G.S. § 163-278.66(a). Consequently, [IEPAC] will not make its independent expenditure.

(Id. ¶ 3.) Like the 21 day provision, the North Carolina legislature has recently *521 amended the reporting provision to which IEPAC's President refers, § 163-278.66(a). As discussed below, the threshold amount has increased to $5000 and the reference to 50% of the rescue fund trigger removed. The expedited reporting requirement remains. The alleged injury to IEPAC is still present even though the reporting provision has been amended, and IEPAC has standing to challenge the reporting provision and the rescue fund provision.[3]

B. Tax Injunction Act

Defendants assert another jurisdictional challenge.

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[3]Defendants further argue that plaintiffs lack standing as to claims against defendants the District Attorney for Wake County and the Attorney General. This issue is left for resolution on defendants' motion for failure to state a claim as to these defendants, particularly because plaintiffs do not seek preliminary injunctive relief against these defendants, (see Prelim. Inj. Mot. at 2).

They contend that the Tax Injunction Act, 28 U.S.C. § 1341,[4] bars this court from considering Jackson's and Duke's claim regarding N.C. Gen.Stat. § 84-34. To implement the Fund, that statute requires every active member of the North Carolina State Bar is required to pay annually a $50 "surcharge." N.C. Gen.Stat. § 84-34. According to plaintiffs, "the $50 surcharge unconstitutionally compels speech from Plaintiffs Jackson and Duke in support of the views of candidates they oppose, and even their opponents in future elections." (Pls.' Revised Resp. to Mot. to Dismiss at 9.) Because Jackson and Duke do not assert that the North Carolina state courts would not provide "a plain, speedy, and efficient remedy," 28 U.S.C. § 1341, resolution of the applicability of the Tax Injunction Act turns on whether the $50 surcharge under § 84-34 is a "tax" or a "fee."

According to the Fourth Circuit:

> To determine whether a particular charge is a "fee" or a "tax," the general inquiry is to assess whether the charge is for revenue raising purposes, making it a "tax," or for regulatory or punitive purposes, making it a "fee." *See Collins Holding Corp. v. Jasper County*, 123 F.3d 797, 800 (4th Cir.1997). To aid this analysis, courts have developed a

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[4]"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

three-part test that looks to different factors: (1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge. *See San Juan Cellular Telephone Co. v. Public Service Comm'n*, 967 F.2d 683, 685 (1 st Cir.1992); *see also Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir.1996).

In *San Juan Cellular*, the court set out the precise confines of a "classic tax" versus a "classic fee." The "classic tax" is imposed by the legislature upon a large segment of society, and is spent to benefit the community at large. *See San Juan Cellular*, 967 F.2d at 685. The "classic fee" is imposed by an administrative agency upon only those persons, or entities, subject to its regulation for regulatory purposes, or to raise "money placed in a special fund to defray the agency's regulation-related expenses." *Id.* The San Juan Cellular court noted that most charges will not fall neatly into either extremity and the characteristics of the charge will tend to place it somewhere in the middle. *See id.*

When the three-part inquiry yields a result that places the charge somewhere in the middle of the *San Juan Cellular* descriptions, the most important factor becomes the purpose behind the statute, or regulation, which imposes the charge. *See South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir.1983). In those circumstances if the ultimate use of the reve-

> nue benefits the general public then the charge will qualify as a "tax," while if the benefits are more narrowly circumscribed then the charge will more likely qualify as a "fee." *See San Juan Cellular*, 967 F.2d at 685.

Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir.2000).

In this case the North Carolina legislature has imposed the surcharge. This factor thus indicates the surcharge is a "tax." *See id.* However, a relatively discrete segment of society-active members of the North Carolina State Bar-must pay the surcharge. The surcharges collected pursuant to § 84-34 are placed in the Fund. N.C. Gen.Stat. § 163-278.63(b)(7). These features favor a finding that the surcharge is a "fee." *See Valero*, 205 F.3d at 134. The Fund is used "to finance the election campaigns of certified candidates for office and to pay administrative and enforcement costs of the Board related to this Article [22D]" as well as "[a]ll expenses of administering this Article, including production and distribution of the Voter Guide ... and personnel and other costs incurred by the Board, including public education about the fund...." N.C. Gen.Stat. § 163-278.63(a). The purpose of the Fund thus has aspects which benefit the public at large (e.g., campaign finance, the Voter Guide (which is distributed "to as many voting-age individuals in the State as practical, through a mailing to all residences," N.C. Gen.Stat. § 163-278.69(a)), public education) and which characterize a "tax." So too it serves to defray expenses associated with administering the Fund, which tend to place the surcharge as a "fee." Considering all these features, the court concludes the surcharge falls in the

middle of the tax/fee spectrum. As such, the court must examine the purpose behind § 84-34. *See Valero*, 205 F.3d at 134.

The express purpose of imposing a surcharge on active attorneys in this State is "for the implementation of the Fund." In turn, the Fund's express purpose ... is to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.

N.C. Gen.Stat. § 163-278.61. Such purpose benefits a large segment of North Carolina's general population not only in terms of fair judicial elections but also in terms of the much broader purpose of promoting impartiality of the court system. Because the use of the surcharge collected benefits the public at large, the $50 surcharge qualifies as a "tax," and, pursuant to the Tax Injunction Act, this court lacks jurisdiction to enjoin the collection of the surcharge or enter a declaratory judgment as to its constitutionality.[5] This claim will be dismissed.

C. Motion for Preliminary Injunction

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[5]"It is settled that the broad prophylactic terms of the Tax Injunction Act apply to declaratory as well as injunctive relief...." *Folio v. City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir.1998) (citation omitted).

Plaintiffs request that the court preliminarily "enjoin the Board and the Bar from enforcing North Carolina's public financing scheme and the $50 surcharge, respectively, against Plaintiffs and those similarly situated." (Prelim. Inj. Mot. at 2.)

A sister court has stated well the principles pertaining to the issuance of temporary and preliminary injunctive relief:

> Either a temporary restraining order or a preliminary injunction "... is an extraordinary remedy, to be granted only if the moving party clearly establishes entitlement to the relief sought." A motion for a TRO or for a preliminary injunction is governed by the "balance of hardships" test set forth in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189, 195-96 (4th Cir. 1977). Under *Blackwelder*, the court must make a determination that the plaintiff (1) will suffer irreparable harm if he does not receive the requested injunctive relief. Once this finding has been made, the court must assess (2) the likelihood of harm to the defendants if the court issues a TRO or preliminary injunction against them. The court then must balance these harms to be suffered by the parties if the court denies or grants, respectively, the motion for injunctive relief. Thereafter, the court must conclude (3) that the plaintiff is likely to succeed on the merits, or if the balancing test in the previous steps (i.e., steps "(1) and (2)") clearly favors the plaintiff, the court need only satisfy itself that the plaintiff has raised substantial and serious questions

> on the merits. Finally, the court should consider (4) whether public interest favors injunctive relief.
>
> The four *Blackwelder* factors "... are not, however, all weighted equally." "The 'balance of hardships' reached by comparing the relevant harms to the plaintiff and defendant[s] is the most important determination, dictating, for example, how strong a likelihood of success showing the plaintiff must make." Thus, while the four factors must figure into the court's analysis, the weight given to each depends on the strength of the other factors.

Krichbaum v. United States Forest Serv., 991 F.Supp. 501, 502-503 (W.D.Va.1998) (citations and footnote omitted).

Against these principles, the court is mindful of the fact that plaintiffs seek mandatory injunctive relief. "Mandatory preliminary injunctions [generally] do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *In re Microsoft Corp. Antitrust Lit.*, 333 F.3d 517, 526 (citation and quotation omitted); *see also Taylor v. Freeman*, 34 F.3d 266, 270 n. 2 (4th Cir.1994) ("Mandatory preliminary injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances." (citations omitted)).

1. Irreparable Harm to Plaintiffs/Likelihood of Success

Because the harm plaintiffs contend they will suffer is "inseparably linked to [their] claim of violation

of First Amendment rights," the court considers these factors together. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir.2002); see also Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("[L]oss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." (citation omitted)).

a. The Reporting Provision

The reporting provision, N.C. Gen.Stat. § 163-278.66(a), provides:

> Reporting by Noncertified Candidates and Independent Expenditure Entities.-Any noncertified candidate with a certified opponent shall report total income, expenses, and obligations to the Board by facsimile machine or electronically within 24 hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for rescue funds as defined in G.S. 163-278.62(18). Any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified candidate shall report the total funds received, spent, or obligated for those expenditures to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures, exceeds five thousand dollars ($5,000). After this 24-hour filing, the noncertified candidate or independent expenditure entity shall comply

> with an expedited reporting schedule by filing additional reports after receiving each additional amount in excess of one thousand dollars ($1,000) or after making or obligating to make each additional expenditure(s) in excess of one thousand dollars ($1,000). The schedule and forms for reports required by this subsection shall be made according to procedures developed by the Board.

Duke and IEPAC challenge the provision on several grounds: (1) its expedited reporting requirement is vague, not justified by a compelling state interest, not narrowly tailored, and is unreasonably burdensome; (2) the "obligations" reporting requirement is vague and overbroad; and, (3) the 24-hour reporting time frame is patently unreasonable and not narrowly tailored. (Mem. Supp. Mot. Prelim. Inj. at 16-23.)

There are problems with plaintiffs' allegations regarding the reporting provision. First, as defendants and intervenors point out, plaintiffs' second amended complaint does not assert a vagueness challenge to the expedited reporting requirement or the "obligations" reporting requirement. (See Second Am. Compl. ¶¶ 57-61, 63-67, 80-82.) Without such challenge, it is unnecessary for the court to examine plaintiffs' argument pertaining to the likelihood of success on the merits of that challenge, (see Mem. Supp. Mot. Prelim. Inj. at 17.)

Second, in their amended complaint, plaintiffs do not complain about the amended version of the provision applicable to entities making independent expenditures, such as IEPAC. Effective 3 August 2006, prior

to plaintiffs' filing of the second amended complaint, the North Carolina legislature amended the reporting provision by deleting the requirement that such entities making expenditures in excess of $3000 make a report after total expenditures or obligations made exceeds 50% of the trigger for rescue funds and inserting the requirement that such entities make a report after total expenditures or obligations made exceeds $5000. 2006 N.C. Sess. Laws 192 §§ 12, 19. Plaintiffs' challenge to the former provision is moot except as to the 24-hour reporting requirement and the reporting in $1000 increments because those portions of the law did not change. *See Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir.1992) ("Where a superseding statute leaves objectionable features of the prior law substantially undisturbed, the case is not moot. This court so held in *Ciudadanos Unidos De San Juan v. Hidalgo County Grand Jury Commissioners*, 622 F.2d 807, 824 (5th Cir.1980) (amendment of Texas grand jury selection system to make challenged method optional did not moot plaintiffs' challenge). The court noted that statutory amendment moots a claim only where the amendment 'completely eliminate[s] the harm of which plaintiffs complained.' 622 F.2d at 824.").

Turning to the aspects of the reporting provision which plaintiffs properly challenge, plaintiffs have not shown they are likely to succeed on the merits. Campaign disclosure requirements are subject to "exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). "[T]here [must] be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* (footnotes and citation omitted).

Governmental interests sufficient to survive this level of scrutiny are: (1) "provid[ing] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' "; (2) deterring actual and apparent corruption; and, (3) gathering data to enforce more substantive campaign restrictions. *Id.* at 66-68, 96 S.Ct. 612; *see also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 196, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003).

Here, the reporting provision serves nearly identical interests. Voters are permitted to access to reports submitted pursuant to this provision. *See* N.C. Gen.Stat. § 163-278.66(c). As recognized above, the purpose of the Fund itself is to ensure fair judicial elections and "protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of" such elections. The reporting provision furthers this purpose as well as enables the Board to gather data to effectively implement the trigger and rescue funds provisions of the Fund. These interests are sufficiently compelling to support the reporting provision. See *Daggett v. Commission of Governmental Ethics and Election Practices*, 205 F.3d 445, 466 (1st Cir.2000) (finding Maine statute which requires independent expenditures totaling more than $50 in an election to be reported was supported by interests defined in Buckley: "allows voters access to information about who supports a candidate financially[,] ... allows the Commission to effectively administer the matching funds provision of the [Maine Clean Election] Act [and] deters corruption and its appearance.").

On the other hand, Duke testifies as to the harm the reporting provision imposes:

> [B]ecause of N.C.G.S. Sec. 163-278.66, the 48 hour and expedited reporting requirement requiring information on receipt of campaign contributions and the expedited reporting requirement of campaign expenditures, I am effectively required to disclose my campaign strategy on a potentially 48 hour cycle.[6]FN6 My opponent is not required to expose her campaign strategy through campaign reports. Another burden on my campaign is the extensive time that has to be dedicated to complying with the reporting requirements. Instead of spending time on campaigning, my volunteer is required to spend extensive time filling out forms. Pursuant to N.C.G.S. Sec. 163-278.66 which says that "the noncertified candidate or independent expenditure entity shall comply with an expedited reporting schedule by filing additional reports," my opponent has a distinct advantage by not being required to fill out as many reports as are required of me.

(Second Supp. Duke Aff. ¶ 6.) Yet, participating candidates are also subject to reporting requirements. They "must report any money received, including all previously*526 unreported qualifying contributions, all

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[6]It is not clear how Duke cites a 48-hour period. Perhaps, he relies on § 163-278.66(a) for the proposition that he is required to report contributions within 24 hours and then turn around report expenditures 24 hours later, resulting in a "48 hour cycle."

campaign expenditures, obligations, and related activities to the Board according to procedures developed by the Board." N.C. Gen.Stat. § 163-278.66(b). Members of the public are permitted to access these reports, just as they may access Duke's reports. See id. § 163-278.66(c). Even if Duke is required to report more than his participating opponent, that burden does not make the provision unconstitutional per se. *See Association of American Physicians and Surgeons v. Brewer*, 363 F.Supp. 2d 1197, 1201-03 (D. Ariz.2005) (applying the reasoning of Daggett to a challenge to the Arizona Citizens Clean Elections Act's disclosure requirements, among others, of, which mandate nonparticipating candidates' filing more reports than participating candidates and provide information needed for the Act's fund to distribute matching funds to participating candidates). The reporting provision does not come into play for Duke and other nonparticipating candidates until 80% of trigger for rescue funds is reached. *See* N.C. Gen.Stat. § 163-278.66(a). Thereafter, reporting is required after each additional amount exceeding $1000.[7] Id. These requirements are not unduly burdensome. Plaintiffs take issue with the $1000 threshold, complaining it is both underinclusive and overinclusive. (Mem. Supp. Mot. Prelim. Inj. at 18.) Like the courts in *Buckley*, 424 U.S. at 83, 96 S.Ct. 612, and *Daggett*, 205 F.3d at 466, this court cannot say, nor do plaintiffs contend, that threshold is "wholly without rationality."

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[7]Independent expenditure entities are also required to make reports after each $1000, once the $5000 threshold is met. N.C. Gen.Stat. § 163-278.66(a).

The Board needs the information required to be disclosed to determine when it may issue rescue funds. See N.C. Gen.Stat. § 163-273.67(a). The rescue funds, i.e., public financing, promote the State's anti-corruption interest. Disclosure promotes a fully informed electorate. Thus, there is a "substantial relation" between these interests and the information Duke and other nonparticipating candidates must disclose.

Plaintiffs contend that § 163-278.66(a)'s requirement to report "obligations" is overbroad. The court agrees with defendants and intervenors that *McConnell* forecloses this line of attack. *See* 540 U.S. at 200-01, 124 S.Ct. 619 (upholding requirement in Federal Election Campaign Act of disclosure of executory contracts for electioneering communications; "[t]he District Court speculated that disclosing information about contracts 'that have not been performed, may lead to confusion and an unclear record upon which the public will evaluate the forces operating in the political marketplace.' Without evidence relating to the frequency of nonperformance of executed contracts, such speculation cannot outweigh the public interest in ensuring full disclosure before an election actually takes place." (citation omitted)). In addition, the court notes that participating candidates must likewise disclose "obligations." N.C. Gen.Stat. § 163-278.66(b). Thus, there is no greater burden on nonparticipating candidates and independent expenditure entities than on participating candidates.

Plaintiffs also take issue with the time within which nonparticipating candidates and independent expenditure entities are required to make reports,

within 24 hours after the total amount of expenditures or obligations made, or funds raised or borrowed, exceeds the designated threshold amount. They argue this requirement is overbroad and falls to survive strict scrutiny. The court is hesitant to apply *McConnell* in analyzing this challenge, as defendants and intervenors suggest. It is true that the Court upheld a disclosure provision in *McConnell* which contained a 24-hour reporting requirement. However, as defendants and intervenors acknowledge, it did so without any significant discussion.

Plaintiffs rely on *Citizens for Responsible Gov. State Political Action Comm't v. Davidson*, 236 F.3d 1174 (10th Cir.2000). There, the Tenth Circuit struck down a state statute "impos[ing] disclosure requirements on independent expenditures exceeding $1000" "within twenty-four hours after 'obligating funds' for the expenditure." *Id.* at 1196. The court found the requirement "patently unreasonable" and not narrowly tailored to advance "the State's compelling interests in informing the electorate, preventing corruption and the appearance of corruption, or gathering data." Id. at 1197.

Significant differences exist between that statute and the 24-hour reporting requirement at issue here. As noted above, the reporting requirement does not apply until certain thresholds and circumstances are met. For independent expenditure entities reporting is not required until a $5000 threshold is crossed. And, it is not required of all such entities across the board; only entities "making independent expenditures in support of or in opposition to a certified candidate or in support of a candidate opposing a certified candidate."

N.C. Gen.Stat. § 163-278.66(a). Particularly with respect to nonparticipating candidates, the threshold will likely be met, if at all, at a later stage, closer to the election. At this time, it is important for disclosures to be made promptly to fully inform the public before voting. In addition, data must be gathered to timely effectuate the trigger for rescue funds. In the court's opinion, the statute is narrowly drawn to further North Carolina's compelling interests.

b. The 21 Day Provision

Plaintiffs next argue they are likely to succeed on their claim challenging the 21 day provision. This provision prohibits a candidate from accepting, or a contributor from making, a contribution during the 21 days before the general election until the day after that election under certain circumstances. *See* N.C. Gen Stat. § 163-278.13(e2)(3). Plaintiffs argue that this provision operates as an unconstitutional time limitation on contributions. It is significant to note that the statute does not operate as an outright ban on all contributions during the defined period. The statute specifically excludes contributions and loans from a candidate or his or her spouse. N.C. Gen.Stat. § 163-278.13(e2). Also, the only contributions prohibited during the short time before the general election are those that "cause[ ] the candidate to exceed the 'trigger for rescue funds' ....", where an opposing participating candidate has not received the maximum rescue funds available. *Id.* § 163-278.13(e2)(3).

First, plaintiffs claim a sufficiently compelling government interest does not justify the 21-day "ban" on contributions. (Mem. Supp. Mot. Prelim. Inj. at 23-24.) The Supreme Court has recognized that al-

though contribution limits most definitely burden First Amendment rights, "the prevention of corruption or its appearance constitutes a sufficiently important interest to justify" such limits. *McConnell*, 540 U.S. at 143, 124 S.Ct. 619; *see also Buckley*, 424 U.S. at 25-29, 96 S.Ct. 612. The North Carolina legislature had that interest in mind in enacting the Fund. *See* N.C. Gen.Stat. § 163-278.61. It enacted the 21 day provision to "make meaningful the provisions of" the Fund. *Id.* § 163-278.13(e2). Relying on *Gable v. Patton*, 142 F.3d 940 (6th Cir.1998), *cert. denied*, 525 U.S. 1177, 119 S.Ct. 1112, 143 L.Ed.2d 108 (1999), defendants make a persuasive argument that North Carolina's restriction on contributions during the 21 days before the general election is justified by North Carolina's compelling interest in preventing corruption. In *Gable*, the Sixth Circuit upheld a portion of Kentucky's public financing scheme which prohibits any candidate from receiving contributions from outside sources in the 28 days before an election. The court found any burden on nonparticipating candidates First Amendment rights was justified by the state's interest in preventing corruption. Id. at 950-51.

Plaintiffs' reliance on a subsequent Sixth Circuit case, *Anderson v. Spear*, 356 F.3d 651 (6th Cir.), *cert. denied*, 543 U.S. 956, 125 S.Ct. 453, 160 L.Ed.2d 317 (2004), appears misplaced. There, the court analyzed Kentucky's 28-day ban on contributions as applied to write-ins candidates, who are not eligible to participate in the public financing scheme and therefore are not voluntary non-participants, unlike those in *Gable*. Id. at 674. The court stated:

> Under the *ratio decidendi* of *Gable*, the

> 28-day window contributes to Kentucky's scheme to combat corruption, but only insofar as it supports the trigger, which in turn channels individuals into the corruption-reducing public finance scheme. Under KRS § 121A, however, write-in candidates are not eligible to participate in that scheme, and therefore cannot be channeled into the public finance system. Therefore applying the 28-day window to write-in candidates simply cannot be intended to combat corruption by channeling write-in candidates into the public finance scheme.

Id. at 674-75.

Second, plaintiffs contend the 21 day provision is overbroad. (Mem. Supp. Mot. Prelim. Inj. at 24.) Plaintiffs point out that there is already in place a limitation on large contributions, § 163-278.13(a) (contributions to any candidate or political committee limited to $4000 in any election). (*Id.*) While that limitation no doubt furthers North Carolina's anti-corruption interest, that does not necessarily mean North Carolina cannot enact any other contribution restrictions to further that same interest. The 21 day provision does not bar all contributions, applies only to appellate court candidates, and is for a limited time. Like the statute at issue in *Gable*, the provision is necessary to properly effectuate the trigger for rescue funds. See 142 F.3d at 949. Without the provision, if rescue funds are triggered by a contribution to a nonparticipating candidate shortly before the election, the Board may not have sufficient time to issue the funds to a participating candidate. See id. at

949-50. It appears the provision in narrowly tailored to advance North Carolina's interest.

c. Rescue Funds Provision and Public Financing Scheme

Finally, plaintiffs advance several challenges to the rescue funds provision and North Carolina's public financing scheme as a whole. They argue that, because a nonparticipating candidate's own contributions and expenditures count towards the trigger for a participating (opposing) candidate's receipt of rescue funds, nonparticipating candidates are effectively penalized for contributions to and expenditures for their own campaigns which Buckley prohibits. As plaintiffs recognize, and as the court has already noted, no direct restrictions are placed on a candidate or his other spouse for making contributions to the candidate's own campaign. *See* N.C. Gen.Stat. § 163-278.13(e2). In addition, there are no restrictions on nonparticipating candidate expenditures. It is the indirect restriction, plaintiffs argue, that violates the constitution. Similarly, plaintiffs contend independent expenditure entities' First Amendment rights are chilled because counting independent expenditures towards the rescue funds trigger may result in making more money available to an opposing participating candidate. They further argue that the rescue funds provision operates as content-based discrimination and impedes the ability of like-minded persons to pool resources.

The court finds persuasive the First Circuit's rationale in examining an individual and two political action committee's challenge to Maine Clean Election Act's matching funds provision:

Direct limitations on independent expenditures have been found impermissibly to burden constitutional rights of free expression. *See Buckley*, 424 U.S. at 44, 96 S.Ct. 612, 46 L.Ed.2d 659; *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 18-19 (1st Cir.1996) (invalidating New Hampshire statute limiting independent expenditures to $1,000 per election). Such cases are of limited application, however, because they involve direct monetary restrictions on independent expenditures, which inherently burden such speech, while the Maine statute creates no direct restriction.

Moreover, the provision of matching funds does not indirectly burden donors' speech and associational rights. Appellants misconstrue the meaning of the First Amendment's protection of their speech. They have no right to speak free from response-the purpose of the First Amendment is to " 'secure the "widest possible dissemination of information from diverse and antagonistic sources." ' " *Buckley*, 424 U.S. at 49, 96 S.Ct. 612, 46 L.Ed.2d 659 (citations omitted); *see Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 14, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (there exists no right to speak "free from vigorous debate"). The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in political speech, nor does it threaten censure or penalty for such expenditures. These facts allow us comfortably to conclude that the provision of

> matching funds based on independent expenditures does not create a burden on speakers' First Amendment rights.
>
> Appellants rely heavily on *Day v. Holahan*, 34 F.3d 1356 (8th Cir.1994), in which the Eighth Circuit invalidated Minnesota's campaign finance statute, which increased a participating candidate's expenditure limit based on independent expenditures made against her or for her major party opponent and under some circumstances matched such independent expenditures. *See id.* at 1359-62. The court held that "[t]o the extent that a candidate's campaign is enhanced by the operation of the statute, the political speech of the individual or group who made the independent expenditure 'against' her (or in favor of her opponent) is impaired." *Id.* at 1360. We cannot adopt the logic of *Day*, which equates responsive speech with an impairment to the initial speaker.

Daggett, 205 F.3d at 464 (1st Cir.2000) (footnote omitted, recognizing "the continuing vitality of Day is open to question."); *see also Brewer*, 363 F.Supp. 2d at 1198, 1200-01, 1202-03 (following Daggett in rejecting a similar challenge to the Arizona Citizens Clean Election Act's matching funds provision).

With respect to the public financing scheme as a whole, plaintiffs argue that the scheme places nonparticipating candidates at a distinct disadvantage relative to participating candidates, representing invidious and unconstitutional discrimination. The parties all rely on Buckley to support their respective positions. There, the Court stated, "the Constitution does not

require [the legislative body] to treat all declared candidates the same for public financing purposes." *Buckley*, 424 U.S. at 97, 96 S.Ct. 612. In examining an equal protection challenge to the Presidential Election Campaign Fund, the Court recognized that

> [i]n several situations concerning the electoral process, the principle has been developed that restrictions on access to the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a "vital" governmental interest, that is "achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity."

Id. at 93-94, 96 S.Ct. 612 (citations omitted). The court simply disagrees with plaintiffs' argument that the scheme's reporting provision, trigger, and 21 day provision unfairly or unnecessarily burden nonparticipating candidates' political opportunities, (see Mem. Supp. Mot. Prelim. Inj. at 29-30), given the important interests advanced by the public financing scheme.

In sum, plaintiffs have not shown a likelihood of success on the merits on any of their claims challenging §§ 163-278.13(e2), 163-278.66(a), 163-278.67 and North Carolina's public financing scheme as a whole. Accordingly, plaintiffs have not made a strong showing of irreparable harm.

2. Harm to Defendants/ Public Interest

Because state officials are the parties against whom the injunction is sought, and they represent the

public interest, consideration of the harm to them should the injunction issue merges with consideration of the public interest. The general election is less than two weeks way. Invalidating any of the statutes at issue, and particularly the Fund as a whole, would likely disrupt the electoral process for appellate judges. Eight of the twelve candidates in the general election are participating in the Fund. (Defs.' Revise Mem. Opp'n Mot. Prelim. Inj., Strach Decl. ¶ 6.) These candidates have relied upon the Fund being in place through the general election, adhering to its limitations and restrictions and making campaign strategy decisions based on those limitations and restrictions.

In balancing the foregoing factors, the court concludes a preliminary injunction is not warranted.

III. CONCLUSION

In sum, plaintiff Jackson's claims challenging N.C. Gen.Stat. §§ 163-278.12(e2)(3), 163-278.66, and 163-278.67 and the public financing scheme as a whole are DISMISSED for lack of standing. Plaintiffs Jackson's and Duke's claim challenging N.C. Gen.Stat. § 84-34 is DISMISSED for lack of jurisdiction. Plaintiffs' motion to consolidate a hearing on their motion for preliminary injunction with trial is DENIED. Plaintiffs' motion for a preliminary injunction is DENIED. Defendants' and intervenors' motions to dismiss remain pending in part. Plaintiffs' motion for class certification also remains for consideration.

U.S. Const. amend. I (in relevant part)

Congress shall make no law . . . abridging the freedom of speech[.]

N.C. Gen. Stat. § 163-278.6

Definitions. When used in this Article:

(1) The term "board" means the State Board of Elections with respect to all candidates for State, legislative, and judicial offices and the county or municipal board of elections with respect to all candidates for county and municipal offices. The term means the State Board of Elections with respect to all statewide referenda and the county or municipal board of elections conducting all local referenda.

(2) The term "broadcasting station" means any commercial radio or television station or community antenna radio or television station. Special definitions of 'radio' and 'television' that apply only in Part 1A of this Article are set forth in G.S. 163-278.38Z.

(3) The term "business entity" means any partnership, joint venture, joint-stock company, company, firm, or any commercial or industrial establishment or enterprise.

(4) The term "candidate" means any individual who, with respect to a public office listed in G.S. 163-278.6(18), has filed a notice of candidacy or a petition requesting to be a candidate, or has been certified as a nominee of a political party for a vacancy, has otherwise qualified as a candidate in a manner authorized by law, or has received funds or made payments or has given the consent for anyone else to receive funds or transfer anything of value for the

purpose of exploring or bringing about that individual's nomination or election to office. Transferring anything of value includes incurring an obligation to transfer anything of value. Status as a candidate for the purpose of this Article continues if the individual is receiving contributions to repay loans or cover a deficit or is making expenditures to satisfy obligations from an election already held. Special definitions of 'candidate' and 'candidate campaign committee' that apply only in Part 1A of this Article are set forth in G.S. 163-278.38Z.

(5) The term "communications media" or "media" means broadcasting stations, carrier current stations, newspapers, magazines, periodicals, outdoor advertising facilities, billboards, newspaper inserts, and any person or individual whose business is polling public opinion, analyzing or predicting voter behavior or voter preferences. Special definitions of 'print media,' 'radio,' and 'television' that apply only in Part 1A of this Article are set forth in G.S. 163-278.38Z.

(6) The terms "contribute" or "contribution" mean any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, to a candidate to support or oppose the nomination or election of one or more clearly identified candidates, to a political committee, to a political party, or to a referendum committee, whether or not made in an election year, and any contract, agreement, promise or other obligation, whether or not legally enforceable, to make a contribution. These terms include, without limitation, such contributions as labor or personal services, postage, publication of campaign literature or materials, in-kind transfers, loans or use of any supplies,

office machinery, vehicles, aircraft, office space, or similar or related services, goods, or personal or real property. These terms also include, without limitation, the proceeds of sale of services, campaign literature and materials, wearing apparel, tickets or admission prices to campaign events such as rallies or dinners, and the proceeds of sale of any campaign-related services or goods. Notwithstanding the foregoing meanings of "contribution," the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate, political committee, or referendum committee. The term "contribution" does not include an "independent expenditure." If:

a. Any individual, person, committee, association, or any other organization or group of individuals, including but not limited to, a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) makes, or contracts to make, any disbursement for any electioneering communication, as defined in G.S. 163-278.80(2) and (3) and G.S. 163-278.90(2) and (3); and

b. That disbursement is coordinated with a candidate, an authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party, or committee

that disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party.

(7) The term "corporation" means any corporation

established under either domestic or foreign charter, and includes a corporate subsidiary and any business entity in which a corporation participates or is a stockholder, a partner or a joint venturer. The term applies regardless of whether the corporation does business in the State of North Carolina.

(7a) The term "costs of collection" means monies spent by the State Board of Elections in the collection of the penalties levied under this Article to the extent the costs do not constitute more than fifty percent (50%) of the civil penalty. The costs are presumed to be ten percent (10%) of the civil penalty unless otherwise determined by the State Board of Elections based on the records of expenses incurred by the State Board of Elections for its collection procedures.

(7b) The term "day" means calendar day.

(7c) The term "election cycle" means the period of time from January 1 after an election for an office through December 31 after the election for the next term of the same office. Where the term is applied in the context of several offices with different terms, "election cycle" means the period from January 1 of an odd-numbered year through December 31 of the next even-numbered year.

(8) The term "election" means any general or special election, a first or second primary, a run-off election, or an election to fill a vacancy. The term "election" shall not include any local or statewide referendum.

(8a) The term "enforcement costs" means salaries, overhead, and other monies spent by the State Board of Elections in the enforcement of the penalties provisions of this Article, including the costs of investigators, attorneys, travel costs for State Board employees

and its attorneys, to the extent the costs do not constitute more than fifty percent (50%) of the sum levied for the enforcement costs and civil late penalty.

(9) The terms "expend" or "expenditure" mean any purchase, advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, whether or not made in an election year, and any contract, agreement, promise or other obligation, whether or not legally enforceable, to make an expenditure, to support or oppose the nomination, election, or passage of one or more clearly identified candidates, or ballot measure. Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party. The term "expenditure" also includes any payment or other transfer made by a candidate, political committee, or referendum committee.

(9a) The term "independently expend" or "independent expenditure" means an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes. Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party. A contribution is not an independent expenditure. As applied to referenda, the term "independent expenditure" applies if consultation or coordination does not take place with a referendum committee that supports a ballot measure the expenditure supports, or a referendum committee that

opposes the ballot measure the expenditure opposes.

(10) The term "individual" means a single individual or more than one individual.

(11) The term "insurance company" means any person whose business is making or underwriting contracts of insurance, and includes mutual insurance companies, stock insurance companies, and fraternal beneficiary associations.

(12) The term "labor union" means any union, organization, combination or association of employees or workmen formed for the purposes of securing by united action favorable wages, improved labor conditions, better hours of labor or work-related benefits, or for handling, processing or righting grievances by employees against their employers, or for representing employees collectively or individually in dealings with their employers. The term includes any unions to which Article 10, Chapter 95 applies.

(13) The term "person" means any business entity, corporation, insurance company, labor union, or professional association.

(14) The term "political committee" means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes, or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:

a. Is controlled by a candidate;

b. Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;

c. Is created by a corporation, business entity,

insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or

d. Has as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates.

Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.

If the entity qualifies as a "political committee" under sub-subdivision a., b., c., or d. of this subdivision, it continues to be a political committee if it receives contributions or makes expenditures or maintains assets or liabilities. A political committee ceases to exist when it winds up its operations, disposes of its assets, and files its final report.

Special definitions of "political action committee" and "candidate campaign committee" that apply only in Part 1A of this Article are set forth in G.S. 163-278.38Z.

(15) The term "political party" means any political party organized or operating in this State, whether or not that party is recognized under the provisions of G.S. 163-96. A special definition of 'political party organization' that applies only in Part 1A of this Article is set forth in G.S. 163-278.38Z.

(16) Repealed by S.L. 1999-31, § 4(a), eff. May 4, 1999.

(17) The term "professional association" means any trade association, group, organization, association, or collection of persons or individuals formed for the purposes of advancing, representing, improving, furthering or preserving the interests of persons or individuals having a common vocation, profession, calling, occupation, employment, or training.

(18) The term "public office" means any office filled by election by the people on a statewide, county, municipal or district basis, and this Article shall be applicable to such elective offices whether the election therefor is partisan or nonpartisan.

(18a) The term "referendum" means any question, issue, or act referred to a vote of the people of the entire State by the General Assembly, a unit of local government, or by the people under any applicable local act and includes constitutional amendments and State bond issues. The term "referendum" includes any type of municipal, county, or special district referendum and any initiative or referendum authorized by a municipal charter or local act. A recall election shall not be considered a referendum within the meaning of this Article.

(18b) The term "referendum committee" means a combination of two or more individuals such as a committee, association, organization, or other entity or a combination of two or more business entities, corporations, insurance companies, labor unions, or professional associations such as a committee, association, organization, or other entity the primary purpose of which is to support or oppose the passage of any referendum on the ballot. If the entity qualifies as a "referendum committee" under this subdivision, it continues to be a referendum committee if it receives contributions or makes expenditures or maintains assets or liabilities. A referendum committee ceases to exist when it winds up its operations, disposes of its assets, and files its final report.

(19) The term "treasurer" means an individual appointed by a candidate, political committee, or referendum committee as provided in G.S. 163-278.7 or G.S.

163-278.40A.

N.C. Gen. Stat. § 163-278.13

Limitation on contributions. (a) No individual, political committee, or other entity shall contribute to any candidate or other political committee any money or make any other contribution in any election in excess of four thousand dollars ($4,000) for that election.

(b) No candidate or political committee shall accept or solicit any contribution from any individual, other political committee, or other entity of any money or any other contribution in any election in excess of four thousand dollars ($4,000) for that election.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, it shall be lawful for a candidate or a candidate's spouse, parents, brothers and sisters to make a contribution to the candidate or to the candidate's treasurer of any amount of money or to make any other contribution in any election in excess of four thousand dollars ($4,000) for that election.

(d) For the purposes of this section, the term "an election" means any primary, second primary, or general election in which the candidate or political committee may be involved, without regard to whether the candidate is opposed or unopposed in the election, except that where a candidate is not on the ballot in a second primary, that second primary is not "an election" with respect to that candidate.

(d1) Notwithstanding subsections (a) and (b) of this section, a candidate or political committee may accept a contribution knowing that the contribution is to be reimbursed to the entity making the contribution and

knowing the candidate or political committee has funds sufficient to reimburse the entity making the contribution if all of the following conditions are met:

(1) The entity submits sufficient information of the contribution to the candidate or political committee for reimbursement within 45 days of the contribution.

(2) The candidate or political committee makes a reimbursement to the entity making the contribution within seven days of submission of sufficient information.

(3) The candidate or political committee indicates on its report under G.S. 163-278.11 that the good, service, or other item resulting in the reimbursement is an expenditure of the candidate or political committee, and notes if the contribution was by credit card.

(4) The contribution does not exceed one thousand dollars ($1,000.00).

(d2) Any contribution, or portion thereof, made under subsection (d1) of this section that is not submitted for reimbursement in accordance with subsection (d1) of this section shall be treated as a contribution for purposes of this section. Any contribution, or portion thereof, made under subsection (d1) of this section that is not reimbursed in accordance with subsection (d1) of this section shall be treated as a contribution for purposes of this section.

(e) Except as provided in subsections (e2), (e3), and (e4) of this section, this section shall not apply to any national, State, district or county executive committee of any political party. For the purposes of this section only, the term "political party" means only those

political parties officially recognized under G.S. 163-96.

(e1) No referendum committee which received any contribution from a corporation, labor union, insurance company, business entity, or professional association may make any contribution to another referendum committee, to a candidate or to a political committee.

(e2) In order to make meaningful the provisions of Article 22D of this Chapter, the following provisions shall apply with respect to candidates for justice of the Supreme Court and judge of the Court of Appeals:

(1) No candidate shall accept, and no contributor shall make to that candidate, a contribution in any election exceeding one thousand dollars ($1,000) except as provided for elsewhere in this subsection.

(2) A candidate may accept, and a family contributor may make to that candidate, a contribution not exceeding two thousand dollars ($2,000) in an election if the contributor is that candidate's parent, child, brother, or sister.

(3) No candidate shall accept, and no contributor shall make to that candidate, a contribution during the period beginning 21 days before the day of the general election and ending the day after the general election if that contribution causes the candidate to exceed the "trigger for matching funds" defined in G.S. 163-278.62(18). This subdivision applies with respect to a candidate opposed in the general election by a certified candidate as defined in Article 22D of this Chapter who has not received the maximum matching funds available under G.S. 163-278.67. The recipient of a contribution that apparently violates this subdivision has three days to return the contribution or file a

detailed statement with the State Board of Elections explaining why the contribution does not violate this subdivision.

As used in this subsection, "candidate" is also a political committee authorized by the candidate for that candidate's election. Nothing in this subsection shall prohibit a candidate or the spouse of that candidate from making a contribution or loan secured entirely by that individual's assets to that candidate's own campaign.

(e3) Notwithstanding the provisions of subsections (a) and (b) of this section, no candidate for superior court judge or district court judge shall accept, and no contributor shall make to that candidate, a contribution in any election exceeding one thousand dollars ($1,000), except as provided in subsection (c) of this section. As used in this subsection, "candidate" is also a political committee authorized by the candidate for that candidate's election. Nothing in this subsection shall prohibit a candidate or the spouse of that candidate from making a contribution or loan secured entirely by that individual's assets to that candidate's own campaign.

(e4) In order to make meaningful the provisions of the North Carolina Voter-Owned Elections Act, as set forth in Article 22J of this Chapter, no candidate for an office subject to that Article shall accept, and no contributor shall make to that candidate, a contribution during the period beginning 21 days before the day of the general election and ending the day after the general election if that contribution causes the candidate to exceed the "trigger for matching funds" defined in G.S. 163-278.96(17). As used in this subsection, the term "candidate" also includes "candidate campaign

committee" as defined in G.S. 163-278.38Z(3). Nothing in this subsection shall prohibit a candidate from making a contribution or loan secured entirely by that candidate's assets to that candidate's own campaign or to a political committee, the principal purpose of which is to support that candidate's campaign. This subsection applies with respect to a candidate only if both of the following statements are true regarding that candidate:

(1) That candidate is opposed in the general election by a certified candidate as defined in Article 22J of this Chapter.

(2) That certified candidate has not received the maximum matching funds available under G.S. 163-278.99B(c).

The recipient of a contribution that apparently violates this subsection has three days to return the contribution or file a detailed statement with the State Board of Elections explaining why the contribution does not violate this subsection.

(f) Any individual, candidate, political committee, referendum committee, or other entity that violates the provisions of this section is guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 163-278.61

Purpose of the North Carolina Public Campaign Fund. The purpose of this Article is to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being

especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts. Accordingly, this Article establishes the North Carolina Public Campaign Fund as an alternative source of campaign financing for candidates who demonstrate public support and voluntarily accept strict fund-raising and spending limits. This Article is available to candidates for justice of the Supreme Court and judge of the Court of Appeals in elections to be held in 2004 and thereafter.

N.C. Gen. Stat. § 163-278.62

Definitions. The following definitions apply in this Article:

(1) Board. The State Board of Elections.

(2) Candidate. An individual who becomes a candidate as described in G.S. 163-278.6(4). The term includes a political committee authorized by the candidate for that candidate's election.

(3) Certified candidate. A candidate running for office who chooses to receive campaign funds from the Fund and who is certified under G. S. 163-278.64(c).

(4) Contested primary and contested general election. An election in which there are more candidates than the number to be elected. A distribution from the Fund pursuant to this Article is not a "contribution" and is not subject to the limitations of G.S. 163-278.13 or the prohibitions of G.S. 163-278.15 or G.S. 163-278.19.

(5) Contribution. Defined in G.S. 163-278.6. A distribu-

tion from the Fund pursuant to this Article is not a "contribution" and is not subject to the limitations of G.S. 163-278.13 or the prohibitions of G.S. 163-278.15 or 163-278.19.

(5a) Electioneering communication. As defined in G.S. 163-278.80 and G.S. 163-278.90, except that it is made during the period beginning 30 days before absentee ballots become available for a primary and ending on primary election day and during the period 60 days before absentee ballots become available for a general election and ending on general election day.

(6) Expenditure. Defined in G.S. 163-278.6.

(7) Fund. The North Carolina Public Campaign Fund established in G.S. 163- 278.63.

(8) Independent expenditure. Defined in G.S. 163-278.6.

(9) Maximum qualifying contributions. An amount of qualifying contributions equal to 60 times the filing fee for candidacy for the office.

(10) Minimum qualifying contributions. An amount of qualifying contributions equal to 30 times the filing fee for candidacy for the office.

(11) Nonparticipating candidate. A candidate running for office who is not seeking to be certified under G.S. 163-278.64(c).

(12) Office. A position on the North Carolina Court of Appeals or North Carolina Supreme Court.

(13) Participating candidate. A candidate for office who has filed a declaration of intent to participate under G.S. 163-278.64.

(14) Political committee. Defined in G.S. 163-278.6.

(15) Qualifying contribution. A contribution of not less

than ten dollars ($10.00) and not more than five hundred dollars ($500.00) in the form of a check or money order to the candidate or the candidate's committee that meets both of the following conditions:

a. Made by any registered voter in this State.

b. Made during the qualifying period and obtained with the approval of the candidate or candidate's committee.

(16) Qualifying period. The period beginning September 1 in the year before the election and ending on the day of the primary of the election year.

(17) Referendum committee. Defined in G.S. 163-278.6.

(18) Trigger for matching funds. The dollar amount at which matching funds are released for certified candidates. In the case of a primary, the trigger equals the maximum qualifying contributions for participating candidates. In the case of a contested general election, the trigger equals the base level of funding available under G.S. 163-278.65(b)(4).

N.C. Gen. Stat. § 163-278.63

North Carolina Public Campaign Fund established; sources of funding. (a) Establishment of Fund. The North Carolina Public Campaign Fund is established to finance the election campaigns of certified candidates for office and to pay administrative and enforcement costs of the Board related to this Article. The Fund is a special, dedicated, nonlapsing, nonreverting fund. All expenses of administering this Article, including production and distribution of the Voter Guide required by G.S. 163-278.69 and personnel and other costs incurred by the Board, including public

education about the Fund, shall be paid from the Fund and not from the General Fund. Any interest generated by the Fund is credited to the Fund. The Board shall administer the Fund.

(b) Sources of Funding. Money received from all the following sources must be deposited in the Fund:

(1) Money from the North Carolina Candidates Financing Fund.

(2) Designations made to the Public Campaign Fund by individual taxpayers pursuant to G.S. 105-159.2.

(3) Repealed by S.L. 2005-276, § 23A.1(c), eff. Jan. 1, 2006.

(4) Public Campaign Fund revenues distributed for an election that remain unspent or uncommitted at the time the recipient is no longer a certified candidate in the election.

(5) Money ordered returned to the Public Campaign Fund in accordance with G.S. 163-278.70.

(6) Voluntary donations made directly to the Public Campaign Fund. Corporations, other business entities, labor unions, and professional associations may make donations to the Fund.

(7) Money collected from the fifty-dollar ($50.00) surcharge on attorney membership fees in G.S. 84-34.

(c) Determination of Fund Amount. By October 1, 2003, and every two years thereafter, the Board, in conjunction with the Advisory Council for the Public Campaign Fund, shall prepare and provide to the Joint Legislative Commission on Governmental Operations of the General Assembly a report documenting, evalu-

ating, and making recommendations relating to the administration, implementation, and enforcement of this Article. In its report, the Board shall set out the funds received to date and the expected needs of the Fund for the next election.

N.C. Gen. Stat. § 163-278.64

Requirements for participation; certification of candidates. (a) Declaration of Intent to Participate. Any individual choosing to receive campaign funds from the Fund shall first file with the Board a declaration of intent to participate in the act as a candidate for a stated office. The declaration of intent shall be filed before or during the qualifying period and before collecting any qualifying contributions. In the declaration, the candidate shall swear or affirm that only one political committee, identified with its treasurer, shall handle all contributions, expenditures, and obligations for the participating candidate and that the candidate will comply with the contribution and expenditure limits set forth in subsection (d) of this section and all other requirements set forth in this Article or adopted by the Board. Failure to comply is a violation of this Article.

(b) Demonstration of Support of Candidacy. Participating candidates who seek certification to receive campaign funds from the Fund shall first, during the qualifying period, obtain qualifying contributions from at least 350 registered voters in an aggregate sum that at least equals the amount of minimum qualifying contributions described in G.S. 163-278.62(10) but that does not exceed the amount of maximum qualifying contributions described in G.S. 163- 278.62(9). No

payment, gift, or anything of value shall be given in exchange for a qualifying contribution.

(c) Certification of Candidates. Upon receipt of a submittal of the record of demonstrated support by a participating candidate, the Board shall determine whether or not the candidate has complied with all the following requirements:

(1) Signed and filed a declaration of intent to participate in this Article.

(2) Submitted a report itemizing the appropriate number of qualifying contributions received from registered voters, which the Board shall verify through a random sample or other means it adopts. The report shall include the county of residence of each registered voter listed.

(3) Filed a valid notice of candidacy pursuant to Article 25 of this Chapter.

(4) Otherwise met the requirements for participation in this Article.

The Board shall certify candidates complying with the requirements of this section as soon as possible and no later than five business days after receipt of a satisfactory record of demonstrated support.

(d) Restrictions on Contributions and Expenditures for Participating and Certified Candidates. The following restrictions shall apply to contributions and expenditures with respect to participating and certified candidates:

(1) Beginning January 1 of the year before the election and before the filing of a declaration of intent, a candidate for office may accept in contributions up to ten thousand dollars ($10,000) from

sources and in amounts permitted by Article 22A of this Chapter and may expend up to ten thousand dollars ($10,000) for any campaign purpose. A candidate who exceeds either of these limits shall be ineligible to file a declaration of intent or receive funds from the Public Campaign Fund.

(2) From the filing of a declaration of intent through the end of the qualifying period, a candidate may accept only qualifying contributions, contributions under ten dollars ($10.00) from North Carolina voters, and personal and family contributions permitted under subdivision (4) of this subsection. The total contributions the candidate may accept during this period shall not exceed the maximum qualifying contributions for that candidate. In addition to these contributions, the candidate may only expend during this period the remaining money raised pursuant to subdivision (1) of this subsection and possible matching funds received pursuant to G.S. 163- 278.67.

(3) After the qualifying period and through the date of the general election, the candidate shall expend only the funds the candidate receives from the Fund pursuant to G.S. 163-278.65(b)(4) plus any funds remaining from the qualifying period and possible matching funds.

(4) During the qualifying period, the candidate may contribute up to one thousand dollars ($1,000) of that candidate's own money to the campaign. Debt incurred by the candidate for a campaign expenditure shall count toward that limit. The candidate may accept in contributions one thousand dollars ($1,000) from each member of that candidate's family consisting of spouse, parent,

child, brother, and sister.

(5) A candidate and the candidate's committee shall limit the use of all revenues permitted by this subsection to expenditures for campaign- related purposes only. The Board shall publish guidelines outlining permissible campaign-related expenditures. In establishing those guidelines, the Board shall differentiate expenditures that reasonably further a candidate's campaign from expenditures for personal use that would be incurred in the absence of the candidacy. In establishing the guidelines, the Board shall review relevant provisions of G.S. 163-278.42(e), the Federal Election Campaign Act, and rules adopted pursuant to it, and similar provisions in other states.

(6) Any contribution received by a participating or certified candidate that falls outside that permitted by this subsection shall be returned to the donor as soon as practicable. Contributions intentionally made, solicited, or accepted in violation of this Article are subject to civil penalties as specified in G.S. 163-278.70. The funds involved shall be forfeited to the Civil Penalty and Forfeiture Fund.

(7) A candidate shall return to the Fund any amount distributed for an election that is unspent and uncommitted at the date of the election, or at the time the individual ceases to be a certified candidate, whichever occurs first. For accounting purposes, all qualifying, personal, and family contributions shall be considered spent before revenue from the Fund is spent or committed.

(e) Revocation. A candidate may revoke, in writing to the Board, a decision to participate in the Public

Campaign Fund at any time before the deadline set by the Board for the candidate's submission of information for the Voter Guide described in G.S. 163-278.69. After a timely revocation, that candidate may accept and expend outside the limits of this Article without violating this Article. Within 10 days after revocation, a candidate shall return to the Board all money received from the Fund.

N.C. Gen. Stat. § 163-278.65

Distribution from the Fund. (a) Timing of Fund Distribution. The Board shall distribute to a certified candidate revenue from the Fund in an amount determined under subdivision (b)(4) of this section within five business days after the certified candidate's name is approved to appear on the ballot in a contested general election, but no earlier than five business days after the primary.

(b) Amount of Fund Distribution. By August 1, 2003, and no less frequently than every two years thereafter, the Board shall determine the amount of funds, rounded to the nearest one hundred dollars ($100.00), to be distributed to certified candidates as follows:

(1) Uncontested primaries. No funds shall be distributed.

(2) Contested primaries. No funds shall be distributed except as provided in G.S. 163-278.67.

(3) Uncontested general elections. No funds shall be distributed.

(4) Contested general elections. Funds shall be distributed to a certified candidate for a position on the Court of Appeals in an amount equal to 125

times the candidate's filing fee as set forth in G.S. 163-107. Funds shall be distributed to a certified candidate for a position on the Supreme Court in an amount equal to 175 times the candidate's filing fee as set forth in G.S. 163-107.

(c) Method of Fund Distribution. The Board, in consultation with the State Treasurer and the State Controller, shall develop a rapid, reliable method of conveying funds to certified candidates. In all cases, the Board shall distribute funds to certified candidates in a manner that is expeditious, ensures accountability, and safeguards the integrity of the Fund. If the money in the Fund is insufficient to fully fund all certified candidates, then the available money shall be distributed proportionally, according to each candidate's eligible funding, and the candidate may raise additional money in the same manner as a noncertified candidate for the same office up to the unfunded amount of the candidate's eligible funding.

N.C. Gen. Stat. § 163-278.66

Reporting requirements. (a) Reporting by Noncertified Candidates and Independent Expenditure Entities. Any noncertified candidate with a certified opponent shall report total income, expenses, and obligations to the Board by facsimile machine or electronically within 24 hours after the total amount of campaign expenditures or obligations made, or funds raised or borrowed, exceeds eighty percent (80%) of the trigger for matching funds as defined in G.S. 163-278.62(18). Any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a

certified candidate, or paying for electioneering communications, referring to one of those candidates, shall report the total funds received, spent, or obligated for those expenditures or payments to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures or electioneering communications exceeds five thousand dollars ($5,000). After this 24-hour filing, the noncertified candidate or other reporting entity shall comply with an expedited reporting schedule by filing additional reports after receiving each additional amount in excess of one thousand dollars ($1,000) or after making or obligating to make each additional expenditure(s) or payment(s) in excess of one thousand dollars ($1,000). The schedule and forms for reports required by this subsection shall be made according to procedures developed by the Board.

(b) Reporting by Participating and Certified Candidates. Notwithstanding other provisions of law, participating and certified candidates shall report any money received, including all previously unreported qualifying contributions, all campaign expenditures, obligations, and related activities to the Board according to procedures developed by the Board. A certified candidate who ceases to be certified or ceases to be a candidate or who loses an election shall file a final report with the Board and return any unspent revenues received from the Fund. In developing these procedures, the Board shall utilize existing campaign reporting procedures whenever practical.

(c) Timely Access to Reports. The Board shall ensure prompt public access to the reports received in accor-

dance with this Article. The Board may utilize electronic means of reporting and storing information.

N.C. Gen. Stat. § 163-278.67

Matching funds. (a) When Matching Funds Become Available. When any report or group of reports shows that "funds in opposition to a certified candidate or in support of an opponent to that candidate" as described in this section, exceed the trigger for matching funds as defined in G.S. 163-278.62(18), the Board shall issue immediately to that certified candidate an additional amount equal to the reported excess within the limits set forth in this section. "Funds in opposition to a certified candidate or in support of an opponent to that candidate" shall be equal to the sum of subdivisions (1) and (2) as follows:

(1) The greater of the following:

a. Campaign expenditures or obligations made, or funds raised or borrowed, whichever is greater, reported by any one nonparticipating candidate who is an opponent of a certified candidate. Where a certified candidate has more than one nonparticipating candidate as an opponent, the measure shall be taken from the nonparticipating candidate showing the highest relevant dollar amount.

b. The funds distributed in accordance with G.S. 163-278.65(b) to a certified opponent of the certified candidate.

(2) The aggregate total of all expenditures and payments reported in accordance with G.S. 163-278.66(a) of entities making independent expenditures or electioneering communications in

opposition to the certified candidate or in support of any opponent of that certified candidate.

(b) Limit on Matching Funds in Contested Primary. Total matching funds to a certified candidate in a contested primary shall be limited to an amount equal to two times the maximum qualifying contributions for the office sought.

(c) Limit on Matching Funds in Contested General Election. Total matching funds to a certified candidate in a contested general election shall be limited to an amount equal to two times the amount described in G.S. 163- 278.65(b)(4).

(d) Determinations by Board. In the case of electioneering communications, the Board shall determine which candidate, if any, is entitled to receive matching funds as a result of the communication. The Board shall issue matching funds based on the communication only if it ascertains that the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. In making its determination, the Board shall not consider evidence external to the communication itself of the intent of the sponsor or the effect of the communication. The Board shall notify each candidate it determines is entitled to receive matching funds based on those communications, the sponsor of those communications, and any candidate who is an opponent of the candidate it determines is entitled to the matching funds. The Board shall give the sponsor of the communication and any opposing candidate an adequate opportunity to rebut the determination of the Board. In considering the rebuttal, all candidates in the race and the sponsor shall be given adequate and equal opportunity to be heard. The Board shall adopt procedures for imple-

menting this subsection, balancing in those procedures adequacy of opportunity to rebut and adequacy and equality of opportunity to be heard on the rebuttal with the need to expedite the decision on awarding matching funds. The Board shall distribute the matching funds, if any, at the conclusion of its process.

(e) Proportional Measuring of Multicandidate Communications. In calculating the amount of matching funds a certified candidate is eligible to receive under this section, the Board shall include the proportion of expenditures, obligations, or payments for multicandidate communications that pertain to the candidate.

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No. 08-120

Supreme Court, U.S.
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In the
Supreme Court of the United States

W. RUSSELL DUKE, JR., AND NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT EXPENDITURES,

Petitioners,

v.

LARRY LEAKE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Response in Opposition to Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1. Whether *Davis v. FEC*, 128 S. Ct. 2759 (2008), should prompt review when there are fundamental differences between the discriminatory limits at issue in *Davis* and the structure of North Carolina's system of voluntary public financing for judicial elections?

2. Whether the applicability of the Court's recent decision in *Davis* to a voluntary public campaign funding system should be reviewed when there is no split among the Circuits and the petition presents novel issues that were not considered by the appellate court below – or by any appellate court – and that should be reviewed in the first instance by the lower courts?

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The Order and Judgment of the United States District Court for the Eastern District of North Carolina, from which petitioners appealed to the United States Court of Appeals for the Fourth Circuit, were not attached to the petition for writ of certiorari. They are attached to this Brief as Appendix pages 1a-16a.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

Petitioners attached copies of constitutional and statutory provisions involved in this action as appendices to their petition for writ of certiorari. The copies of N.C. Gen. Stat. §§ 163-278.66 and -278.67 attached to the petition, however, are outdated versions of the statutes, which were amended effective August 2, 2008. 2008 N.C. Sess. Laws 150, § 7(b) and (c); § 10.2(b) and (c). In addition, the same session law repealed N.C. Gen. Stat. § 163-278.13(e2)(3), which is printed at pages 66a-67a of the petition. 2008 N.C. Sess. Laws 150, § 7(a). Because the revised statutes have not yet been published, the relevant sections of 2008 N.C. Sess. Laws 150 are attached to this Brief as Appendix pages 17a-21a.

STATEMENT

While a number of public funding campaign programs exist for executive, legislative or local offices, North Carolina was the first and remains one of the few States to implement a program for public financing of judicial campaigns. In 2002, the North Carolina General Assembly enacted the Judicial Campaign Reform Act ("JCRA"), 2002 N.C. Sess. Laws 158, creating the North Carolina Public Campaign Financing Fund ("the Fund"). N.C. Gen. Stat., Chapter 163, Article 22D (N.C. Gen. Stat.§ 163-278.61, *et seq.*). The Fund was first used in the 2004 election. Its purpose is

> to ensure the fairness of democratic elections in North Carolina and to protect the constitutional rights of voters and candidates from *the detrimental effects of increasingly large amounts of money being raised and spent to influence the outcome of elections, those effects being especially problematic in elections of the judiciary, since impartiality is uniquely important to the integrity and credibility of the courts.*

N.C. Gen. Stat. § 163-278.61 (emphasis added).

The JCRA, administered by the State Board of Elections ("State Board"), provides a comprehensive

program that allows candidates seeking election to appellate judicial seats, once qualified, voluntarily to accept strict limitations on private fund-raising activity in exchange for limited public financing of their campaigns. N.C. Gen. Stat. § 163-278.64(d). To qualify, candidates must file a notice of intent to participate and collect qualifying contributions from at least 350 registered voters, in amounts between $10 and $500, which in aggregate must equal between 30 and 60 times the candidate's filing fee. N.C. Gen. Stat. § 163-278.64(a)-(b). Once a candidate has qualified, no further private contributions can be raised by him. N.C. Gen. Stat. § 163-278.64(d). Upon being certified for participation, a participating candidate in a contested general election then receives an initial base level of funding and may also receive a limited amount of additional funds ("matching funds") in the event that a nonparticipating opponent or independent group spends more than a pre-determined sum (the "trigger amount") in opposition to the candidacy. N.C. Gen. Stat. § 163-278.67(a). In a primary, the trigger amount equals the maximum qualifying contribution for participating candidates; in a general election, it equals the base level of funding.[1] *Id.*

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[1] In the 2006 election, in which petitioner Duke was a candidate for Chief Justice of North Carolina, the base level of funding for that office was $216,650 for the general election. Because the Chief Justice has the highest salary of appellate judges, and because the base level of funding is

A participating candidate cannot receive any matching funds if total spending in opposition to the candidate does not exceed the trigger amount. N.C. Gen. Stat. § 163-278.65(b)(3). Matching funds are disbursed in an amount equal to the total by which the trigger is exceeded by opposition funds. N.C. Gen. Stat. § 163-278.67(a). Opposition funds include contributions received by nonparticipating candidates as well as independent expenditures or electioneering communications made by persons or entities in support of a nonparticipating candidate.[2] The total matching funds available in a contested primary are capped at two times the maximum qualifying contributions for the office sought. N.C. Gen. Stat. § 163-278.67(b). In a contested general election,

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based on the filing fee for office, which is in turn based on salary for the office, the base level of funding for all other appellate campaigns would be lower than that for Chief Justice.

[2] N.C. Gen. Stat. § 163-278.66(a) provides that either making independent expenditures or paying for electioneering communications, as those terms are statutorily defined, can trigger the release of matching funds. For brevity, "independent expenditures" will be used to refer to both kinds of expenditures.

matching funds are capped at two times the base level of funding. N.C. Gen. Stat. § 163-278.67(c).[3]

To facilitate the matching funds provision, the JCRA contains requirements for reporting the receipt or expenditure of opposition funds. N.C. Gen. Stat. § 163-278.66(a). A nonparticipating candidate facing a participating opponent must make an initial report to the Board disclosing contributions received within 24 hours after those contributions exceed 80% of the trigger for matching funds. *Id.* Entities making independent expenditures must make an initial report within 24 hours of expending more than $5,000. *Id.* After the initial report, nonparticipating candidates must report additional contributions received and other reporting entities must report additional independent expenditures made according to a schedule promulgated by the State Board.[4] N.C. Gen. Stat. § 163-278.66(a). In 2006, the State Board set

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[3] For Chief Justice in 2006, that amount was $433,300.

[4] 2008 N.C. Sess. Laws 150 deleted "obligations" from the items that nonparticipating candidates and entities making independent expenditures are required to report. 2008 N.C. Sess. Laws 150, § 10.2(b).

eight reporting dates between August 22 and November 3.[5]

Because participating candidates may not receive any private contributions after qualifying to participate in the Fund, the JCRA requires special reports of qualifying contributions for participating candidates. In addition, all generally applicable reporting requirements for political committees remain in place for participating candidate committees, including mandatory quarterly reports.

Thus, most candidates, including participating candidates, must file a total of at least 6 reports.[6] Similarly, any political committee making an independent expenditure on behalf of a participating candidate must report that independent expenditure to the State Board. N.C. Gen. Stat. § 163-278.9. Any

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[5] State Board, *August 23, 2006, Letter to The Rusty Duke Committee*, http://www.sboe.state.nc.us/cf_pdf'2006/20070803_55557.pdf .

[6] Petitioners' assertion that certified candidates need make only two reports (Pet. at 7) is incorrect. A candidate is exempted from filing campaign finance reports only if he or she: (1) does not receive more than three thousand dollars ($3,000) in contributions; and (2) does not receive more than three thousand dollars ($3,000) in loans; and (3) does not spend more than three thousand dollars ($3,000). N.C. Gen. Stat. § 163-278.10A(a).

other person or entity making independent expenditures must report them to the State Board within 30 days after the independent expenditures exceed $100 or 10 days before an election that the expenditure affects, whichever is earlier. N.C. Gen. Stat. § 163-278.12.

REASONS TO DENY THE PETITION

This Court has upheld voluntary public funding programs as constitutional because such systems are efforts "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1976). Public financing is unique among campaign finance regulations because it both increases speech and reduces the potential for corruption. In addition, public financing facilitates "communication by candidates with the electorate" and frees "candidates from the pressures of fundraising." *See Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (internal citations and quotations omitted), *cert. denied*, 520 U.S. 1229 (1997).

As the Fourth Circuit recognized, "judicial campaigns in several other states have raised and spent multiple millions of dollars." *North Carolina Right to Life Committee Fund for Independent Political*

Expenditures v. Leake, 524 F.3d 427, 437 (4th Cir. 2008) ("*Leake*"). Against this backdrop, North Carolina adopted a public funding program for appellate judicial candidates to further its compelling state interest in fair and impartial courts. *Id.* ("The concern for promoting and protecting the impartiality and independence of the judiciary . . . dates back at least to our nation's founding, when Alexander Hamilton wrote that 'the complete independence of the courts of justice is peculiarly essential' to our form of government."). *Id.* at 441 (quoting *The Federalist No. 78* at 426 (E. H. Scott ed., 1898)).

Petitioners focus their petition for certiorari on this Court's recent decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008). As the Court recognized in *Davis*, there are crucial differences between the Millionaire's Amendment at issue there and public funding systems such as the one at issue here. *See Davis*, 128 S. Ct. at 2772 ("The choice imposed by [the Millionaire's Amendment] is not remotely parallel to that in *Buckley*."). The Court made clear that it was the discriminatory contribution limits before it in *Davis* that made the Millionaire's Amendment unconstitutional, not the mere fact that increased spending by the self-financed candidate triggered changes in the contribution limits. Indeed, the Court emphasized that the statute would have imposed no burden on protected speech if Congress had simply

raised contribution limits for both candidates. *Davis*, 128 S. Ct. at 2770.

The concern for discriminatory treatment of candidates otherwise similarly situated that underlies *Davis* is not present in this case. Here, any candidate may choose whether to participate in the Fund. After that decision, participating and nonparticipating candidates are not similarly situated. This presents a very different context from that considered in *Davis*, and it is in that different context that the Fourth Circuit's decision must be viewed.

The unanimous Fourth Circuit panel properly "conclude[d] that the provisions challenged . . . , which embody North Carolina's effort to protect this vital interest in an independent judiciary, are within the limits placed on the state by the First Amendment." *Leake*, 524 F.3d at 441. The Fourth Circuit further held that the matching fund provisions provided a "modest" incentive for participation in the program and did not render the program coercive. *Id.* at 436. Though it would clearly be permissible under *Buckley* for North Carolina to provide the maximum amount to every participating candidate as an initial grant, in practice this would waste thousands of public dollars without any discernible benefit to the electoral process.

Petitioners now ask this Court to review whether a State, for the purpose of protecting the real and

perceived integrity and impartiality of its judiciary, may establish a voluntary public funding program for appellate judicial offices and provide reasonable incentives for participation in the program. This Court should deny the instant petition and leave the sound reasoning of the Fourth Circuit undisturbed.

Because neither the district court nor the Court of Appeals has yet reviewed whether *Davis* alters the analysis regarding the constitutionality of the JCRA's provisions, review by this Court would be premature.[7] In fact, no lower court in the country has fully reviewed the applicability of *Davis* to the specific circumstances presented by public financing systems.[8] This Court has traditionally allowed the lower courts to grapple squarely with an issue before taking up the issue itself. The Court should deny the petition or, in the alternative, remand the case to the Fourth Circuit

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[7] This is especially so given the lack of a developed record in this case, which was decided on a motion to dismiss.

[8] Early-stage challenges to legislative and statewide offices related to *Davis* are pending in both Connecticut and Arizona. Plaintiffs' Motion for Preliminary Injunction, *McComish et. al., v. Brewer et. al.*, No. CV-081550-PHX-ROS (D. Az. Sept. 2, 2008); Plaintiffs' Motion for Reconsideration, *Green Party of Connecticut et. al., v. Garfield et. al.*, No. 06-CV-01030-SRU (D. Conn. July 10, 2008).

to consider how, if at all, *Davis* applies in this distinct context.

I. The Decision of the Fourth Circuit Is Not in Conflict with this Court's Decision in *Davis*.

The petition in this case turns on the mistaken contention that the Court of Appeals' decision conflicts with this Court's recent decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008). That argument, however, ignores fundamental differences between the discriminatory contribution limits at issue in *Davis* and the JCRA's provisions challenged here.

The Court in *Davis* held that the nature of the "unprecedented penalty" that the Millionaire's Amendment imposed on a self-financed candidate was "subjection to discriminatory fundraising limitations." *See* 128 S. Ct. at 2771. It was the "different contribution and coordinated party expenditure limits on candidates vying for the same seat" that were "antithetical to the First Amendment." 128 S. Ct at 2774. Moreover, the discriminatory treatment that concerned the Court in *Davis* related to contribution limits in the context of private fundraising. There is no question under the governing precedent that contribution limits impose burdens on First Amendment rights, and therefore must be closely drawn to serve a sufficiently important government

interest. *See Buckley*, 424 U.S. at 15; *Randall v. Sorrell*, 548 U.S. 230, 247 (2006).

In contrast, since the purpose of the First Amendment is to "secure the widest possible dissemination of information from diverse and antagonistic sources," *Buckley*, 424 U.S. at 49, public funding is viewed as facilitating and enlarging speech. *See id.* at 92-93; *see also Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 283-86 (S.D.N.Y.) (three-judge court), *aff'd*, 445 U.S. 955 (1980). This case, then, presents a completely distinct factual and legal context from that considered in *Davis*.

A. The Burden on First Amendment Rights Found by the Court in *Davis* is Inapplicable to Voluntary Public Funding Systems.

Petitioners here challenge matching fund provisions in a voluntary public funding program in which both candidates face an identical set of choices. At the outset of a campaign, all candidates may choose whether to participate in public funding and accept spending limits and stringent fundraising restrictions or to finance their campaigns through private contributions and be free of spending limits. The constitutionality of spending limits that are part of voluntary public funding systems was upheld in *Buckley* and reaffirmed in *Davis*. *Davis*, 128 S. Ct. at

2772 ("Congress 'may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.'"(quoting *Buckley* 424 U.S. at 57 n.65)). Yet, here it is the participating candidate – and not the non-participating candidate – who is subjected to more restrictive regulation.

In *Davis*, both candidates were initially subject to mandatory limits on private fundraising. The limits became asymmetrical, however, once one candidate announced an intention to expend a substantial amount of personal funds on his own campaign. *Davis*, 128 S. Ct. at 2766. The self-financed candidate's fundraising efforts remained subject to the ordinary $2,300 contribution limit and the ordinary limit on coordinated party spending. But his opponent was freed from those limits, and could receive contributions up to three times the ordinary limit and take advantage of additional coordinated party spending. *Davis*, 128 S. Ct. at 2765 (citing BCRA § 319(a), 2 U.S.C. § 441a-1(a)). Thus, the government, by continuing to strictly limit one candidate and significantly relaxing limits on his opponent, violated the First Amendment rights of the self-financed candidate because the law subjected two similarly-situated candidates to different regulatory requirements.

Here, a participating and a nonparticipating candidate under the JCRA are not similarly situated. One candidate opts to accept the public financing option established by the JCRA with all of its associated benefits and burdens; the other chooses to remain in the private financing system, with its own particular benefits and burdens. The rational candidate, having knowledge of all those respective benefits and burdens – including the matching funds provisions – will choose the option that she feels will maximize her communication with the electorate. So long as the differences between the relative benefits and burdens of the two alternatives do not become so extreme that they coerce participation, there is no First Amendment concern. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 470 (1st Cir. 2000).

In *Davis*, the Court noted that, "[i]f § 319(a) simply raised the contribution limits for all candidates, Davis' argument would plainly fail." *Davis*, 128 S. Ct. at 2770. The Court reasoned that requiring "a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations," *id.* at 2771, was a problem of constitutional dimension. But this problem does not and cannot exist in North Carolina's public financing system, where the nonparticipating candidate has no additional fundraising strictures placed upon her by the public financing program after

the trigger is met. Indeed, it is only the participating candidate who from the beginning of the public financing program is subject to limits imposed by the public financing program, e.g., a cap on total funding available and restrictions on how money can be expended. *See* N.C. Gen. Stat. § 163-278.68.

Under *Buckley*, North Carolina indisputably could have given each participating candidate the maximum amount allowable during an election cycle at the outset. Instead, the State opted to provide an initial grant and then to release incrementally a limited amount of matching funds only when circumstances in a particular race warrant more funding. Petitioners would have the Court rule that the privately financed candidate is impermissibly burdened when North Carolina saves state tax dollars by giving the publicly financed candidate *less* money to begin with and provides full funding only when the race becomes more expensive. In essence, petitioners argue that their First Amendment rights are infringed merely because the State of North Carolina provides funds to participating candidates incrementally rather than in one lump sum. Such an argument finds no support in the precedent of this Court, including *Davis*, or in logic.

B. The Matching Funds Provision Does Not Burden Petitioners' First Amendment Rights.

The Fourth Circuit rightly noted that under the matching fund provisions of the Fund, petitioners "remain free to raise and spend as much money, and engage in as much political speech, as they desire," and that the distribution of matching funds "'furthers, not abridges, pertinent First Amendment values' by ensuring that the participating candidate will have an opportunity to engage in responsive speech." *Leake*, 524 F.3d at 437 (quoting *Buckley*, 424 U.S. at 92-93). The fact that the North Carolina program provides for additional public funds to be released to participating candidates in stages, if and when triggered, does not burden the First Amendment rights of candidates who choose not to participate. If one lump-sum distribution of the maximum amount available would not chill the First Amendment rights of nonparticipating candidates or prevent them from raising or spending as much as they desire, incremental distributions surely cannot do so.

Since the initial grant to participating candidates imposes no constitutional burden on the speech of nonparticipating candidates, it follows that the provision of additional funds to participating candidates in response to opposition funds similarly does not impose any burden on the speech of

nonparticipating candidates. Whether the public funding stems from the initial grant or a triggered match, the nature of the asserted injury to nonparticipating candidates is equally non-existent. *See Buckley*, 424 U.S. at 95. Under *Buckley* and its progeny, there is simply no burden on petitioners' protected speech rights presented in this case; *Davis* does not hold otherwise.

Under the JCRA, there is also no burden on the speech of independent groups. The JCRA does not limit organizational fundraising or spending on political speech under any circumstances. The Fourth Circuit rightly noted that under the matching fund provisions of the JCRA, petitioners "remain free to raise and spend as much money, and engage in as much political speech, as they desire." *Leake*, 524 F.3d at 437 (citing *Buckley*, 424 U.S. at 92-93).

C. The Matching Funds Provision Is Appropriately Tailored to Further Multiple Compelling State Interests.

Even if this Court were to find that the decision in *Davis* is applicable and that petitioners' First Amendment rights are burdened, the Fourth Circuit's decision that the matching funds provision is constitutional would still stand. This is so because North Carolina's statute is appropriately tailored to achieve compelling state interests, including reducing

corruption or the appearance of corruption in appellate judicial elections and of encouraging participation in a system intended to further these goals.

Without question, reducing the potential for corruption in judicial elections and assuring the integrity of the courts is a matter of special importance. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (noting that the state interest in maintaining judicial integrity is of "vital importance" and that "judicial integrity is . . . a state interest of the highest order").

To achieve its goal of reducing corruption or its appearance, the state has a related compelling interest in assuring reasonable levels of participation in the program, by convincing candidates to opt in and to forgo their right to raise and spend an unlimited amount of private funds. *See Vote Choice*, 4 F.3d at 39 (state has compelling interest in creating incentives for candidates to accept public financing). The program balances these interests against an equally important interest in conserving the public fisc. *Buckley*, 424 U.S. at 96. In contrast, in *Davis* this Court held that the statute in question impermissibly burdened the First Amendment because there was no compelling governmental interest justifying the burden. The Court reasoned that the burden on personal contributions to one's own campaign did nothing to

further Congress' proffered interest in eliminating corruption; indeed, the potential for higher contributions from one donor to one of the candidates actually undermines the governmental interest underpinning the contribution limit.

Had this case been decided on summary judgment rather than on the State's motion to dismiss, the record would contain evidence demonstrating how the Fund in general, and the matching funds provisions that are an integral part of the Fund in particular, further compelling state interests. Even absent such a developed record, however, it is clear that the Fund and the matching funds provision further interests that this Court and lower courts have consistently found to be compelling state interests. Nothing in *Davis* changes that.

This case differs from *Davis* in another way. In *Davis*, the Court considered legislation passed by Congress that directly affected elections for Congress. The Court expressed concern in *Davis* that the Millionaire's Amendment "ha[d] ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office," when "[t]he Constitution . . . confers upon voters, not Congress, the power to choose the Members of the House of Representatives." 128 S. Ct. at 2773-74. A concern that legislative self-interest rather than a significant

governmental interest motivates the challenged statutes is not present in this case because here the legislation applies to non-partisan judicial elections, not legislators' own elections.

D. The Reporting Requirements Challenged by Petitioners Are Constitutional.

Petitioners seek review of the Fourth Circuit's decision to uphold North Carolina's reporting requirements. Contrary to petitioners' argument, however, mere disclosure requirements need not meet the exacting test of strict scrutiny. They need only bear a substantial relation to an important state interest. *Buckley*, 424 U.S. at 64. As the Fourth Circuit concluded, North Carolina's reporting requirements are substantially related to the important state interests of informing the electorate, deterring actual corruption or the appearance of corruption and "enabling the effective administration of matching funds." *Id.* at 440.

Petitioners' arguments to this Court about burdensome reporting are based on a theoretical possibility and not an actual threat, as recognized by the Fourth Circuit. In an effort to demonstrate that the reporting requirements are onerous, petitioners represent that "noncertified candidates could be required to file dozens of separate reports during the primary and election campaign before the trigger

amount has even been reached, and every day thereafter." (Pet. at 7) As recognized by the Fourth Circuit, N.C. Gen. Stat. § 163-278.66(a) provides that the State Board is to establish a schedule for the filing of these reports. In 2006, this schedule required Duke's campaign to file a total of eight reports, a requirement the court found to be "not particularly burdensome." *Leake*, 524 F.3d at 439-40. There is no reason to believe that the reporting requirements would ever be as onerous as petitioners contend. Petitioners would have this Court grant its writ of certiorari to consider allegations based on nothing more than speculation.

II. No Circuit Has Considered the Application of *Davis* to Public Funding Systems and Thus There Cannot Be a Split among the Circuits.

Petitioners overstate the extent of the disagreement among the courts of appeals regarding whether matching fund provisions such as those of the JCRA impermissibly infringe upon First Amendment rights. The fact that in *Davis* the Court cited to *Day* does not mean that it implicitly decided a significant and complex issue that was not before it in *Davis*.

Far more important, the gravamen of both of petitioners' questions presented concern the implications of *Davis* for public funding systems, which has not yet been the subject of even a single

circuit court opinion. It goes without saying that there can be no circuit split on an issue that has yet to be reviewed by the federal courts. No other circuit decision involves the public financing of judicial campaigns, designed to protect both the appearance and reality of an impartial appellate judiciary – a state interest not considered in *Day*. Here, the North Carolina General Assembly has sought to "attempt some new reform" that would permit appellate judges "to concentrate their time and efforts on official duties rather than on fundraising." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 409 (2000) (Kennedy, J., dissenting). As the decision of the Fourth Circuit is the first Court of Appeals decision dealing with a program for public financing of judicial campaigns, which it recognized advances important governmental interests, *see Leake*, 524 F.3d at 441, its decision cannot be in conflict with decisions from other circuits that do not arise in a similar context.

In addition, *Day* does not contradict the Fourth Circuit's holding below. *Day* itself notes that "[t]he state interest in preventing corruption, or the appearance of corruption, in the political process has been recognized as a compelling state interest that justifies" some infringement on First Amendment rights. *Day v. Holahan*, 34 F.3d 1356, 1363 (8th Cir. 1994). That, however, was not the interest put forth in *Day* in support of the challenged statute. The interest that was put forth to support the specific provision at

issue there – encouraging participation in the public financing system – was not compelling in the Eighth Circuit's view because even without the challenged provision, participation was already at 97%.

By contrast, the Eighth Circuit's decision in *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997), dealt with a public financing mechanism more similar to the matching funds provision here, where a fundraising cap for participating candidates was waived if nonparticipating candidates raised or spent in excess of a threshold amount. The Eighth Circuit upheld that facet of Minnesota's public campaign financing program, aligning itself with the First Circuit in *Daggett* and *Vote Choice*, the Sixth Circuit in *Gable v. Patton*, 142 F.3d 940, 947-49 (6th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999), and now the Fourth Circuit. Like this case, *Daggett* and *Gable* both dealt specifically with matching funds, while *Rosenstiel* dealt with a corollary mechanism. On the issue presented in this case, there is no split among the circuits.

The Fourth Circuit's decision comports with every other federal case, from *Buckley* forward, in applying the legal standard used to evaluate the constitutionality of public funding systems, which requires courts to uphold laws supported by a compelling state interest. *See Davis*, 128 S.Ct. at

2773; *Buckley*, 424 U.S. at 96; *Rosenstiel*, 101 F.3d at 1553; *Day*, 34 F.3d at 1363. To the extent any claim might be made that *Davis* may also apply to such systems, the Court should allow the lower courts to consider the issue as it may come before them, allowing analysis to percolate and develop, rather than acting prematurely to decide questions no other court has had the opportunity to consider fully. For this reason, the petition should be denied.

CONCLUSION

The petition for writ of certiorari should be denied. Alternatively, if the petition is granted, the decision of the Fourth Circuit should be vacated and the matter remanded for further consideration in light of *Davis* and for development of an appropriate record.

Respectfully submitted,

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September 2008

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APPENDIX

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Order, No. 5:06-CV-324-BR
(E.D.N.C. March 30, 2007)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-CV-324-BR

BARBARA JACKSON, et al.,	)	
Plaintiffs,	)	
v.	)	ORDER
LARRY LEAKE, et al.,	)	
Defendants.	)	

This matter is before the court on defendants' and intervenor-defendants' motions to dismiss. Plaintiffs filed a response to the motions, and defendants and intervenor-defendants filed replies. The motions are ripe for disposition.

I. BACKGROUND

On 8 August 2005, plaintiffs Barbara Jackson, Wilton R. Duke, North Carolina Right to Life Committee Fund for Independent Political

Expenditures ("IEPAC"), and North Carolina Right to Life State Political Action Committee ("SPAC") filed this action in the Middle District of North Carolina. They assert constitutional challenges to the North Carolina Public Campaign Financing Fund (the "Fund"), N.C. Gen. Stat. § 163-278.61 et seq., which provides a voluntary source of campaign financing to candidates for the North Carolina appellate courts, and the provision enacted to implement that Fund, N.C. Gen. Stat. § 84-34.[1] On 7 August 2006, U.S. District Judge N. Carlton Tilley, Jr. held that IEPAC and SPAC lack standing to sue the District Attorney for Guilford County, dismissed that defendant, and transferred the case to this court.

On 5 September 2006, the undersigned held a status conference, ruled on a number of motions, and set a briefing schedule on the remaining motions. On 26 October 2006, the court (1) found Jackson lacks standing with respect to all her claims except that challenging N.C. Gen. Stat. § 84-34; (2) dismissed plaintiffs' claims challenging § 84-34 for lack of jurisdiction; and, (3) denied plaintiffs' motion for a preliminary injunction. Remaining are Duke's and

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[1] That statute requires every active member of the North Carolina State Bar to pay annually a $50 "surcharge." N.C. Gen. Stat. § 84-34.

Order, No. 5:06-CV-324-BR
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SPAC's claims challenging N.C. Gen. Stat. § 163-278.13(e2)(3) (the "21 day provision"); Duke's and IEPAC's claims challenging N.C. Gen. Stat. §§ 163-278.66(a) and § 163-278.67 (the "reporting and rescue funds provisions"),[2] and, Duke's claim challenging the public financing scheme as a whole, all of which are against members of the North Carolina State Board of Elections; Roy Cooper, the Attorney General for the

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[2] Section 163-278.66 requires nonparticipating candidates to report campaign contributions or expenditures that exceed certain specified trigger amounts to the Board within 24 hours and any independent entities making expenditures in support of a nonparticipating candidate to make similar reports to the Board. . . ; (2) Section 163-278.67 provides for "rescue funds" for participating candidates in the event the expenditures of a nonparticipating candidate (or of an independent entity in support of a nonparticipating candidate) exceed certain specified trigger amounts. . . [and]; (3) Section 163-278.13(e2)(3) prohibits contributions to the campaign of any candidate during the period beginning 21 days before the general election and ending the day after the general election. . . .

(10/26/06 Order at 2 (quoting Jackson v. Leake, No. 1:05-CV-691, 2006 WL 2264027, *1 (M.D.N.C. Aug. 7, 2006).

State of North Carolina; and C. Colon Willoughby, Jr., the District Attorney for Wake County.[3]

II. DISCUSSION

A. Standing

As the court noted in its earlier order, defendants argue that plaintiffs lack standing as to their claims against Attorney General Cooper and District Attorney Willoughby. (10/26/06 Order at 7 n.3.) Because this issue is jurisdictional, the court must address it before considering the motions to dismiss for failure to state a claim. (See id. at 4 (citing Emory v. Roanoke City School Bd., 432 F. 3d 294, 298 (4th Cir. 2005).)

> The doctrine of standing is an integral component of the case or controversy requirement. There are three components of a constitutional standing: (1) the plaintiff must allege that he or she suffered an actual or threatened injury that is not conjectural or hypothetical; (2) the injury must be fairly

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[3] While members of the North Carolina Bar Administrative Committee remain named defendants, they are not required to participate in these proceedings; they are, however, bound by any judgment entered in the action. (See 9/6/06 Order (allowing said defendants' motion pursuant to Fed. R. Civ. P. 20(b).)

> traceable to the challenged conduct; and (3) a favorable decision must be likely to redress the injury. The party attempting to invoke federal jurisdiction bears the burden of establishing standing.

(Id. (quoting Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006).)

Defendants contend that plaintiffs have alleged no actual or imminent injury traceable to any action of Cooper or Willoughby. Plaintiffs name Cooper as a defendant based on his authority, as Attorney General, to provide the State Board of Elections with legal assistance in execution of the Board's authority to assist a county or municipal board of elections in matters where litigation is contemplated or had been initiated and where the uniform administration of Chapter 163 has or would be threatened. (See Second Am. Compl. ¶ 13 (citing N.C. Gen. Stat. § 163-25[4]).)

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[4] That statute provides in relevant part:

> The State Board of Elections shall possess authority to assist any county or municipal board of elections in any matter in which litigation is contemplated or has been initiated, provided, the county or municipal board of elections in such county petitions, by majority resolution, for such assistance form the State Board of Elections, and,

"Consequently," plaintiffs state, "Attorney General Cooper can assist the State Board of Elections in its determination of whether litigation should be pursued," including litigation against plaintiffs regarding the enforcement of North Carolina's public financing scheme. (9/27/06 Mem. Opp'n Mot. Dismiss at 15)

There is not a sufficient connection between the Attorney General's actions pursuant to this authority and enforcement of the Fund's provisions against plaintiffs. As a general matter, even though the

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> provided further, that the State Board of Elections determines, in its sole discretion by majority vote, to assist in any such matter. It is further stipulated that the State Board of Elections shall not be authorized under this provision to enter into any litigation in assistance to counties, except in those instances where the uniform administration of Chapter 163 of the General Statutes of North Carolina has been, or would be threatened.
>
> The Attorney General shall provide the State Board of Elections with legal assistance in execution of its authority under this section or, in his discretion, recommend that private counsel be employed.

N.C. Gen. Stat. § 163-25.

Attorney General might offer legal assistance to the Board under § 163-25, whether or not the challenged provisions of the Fund are enforced against plaintiffs is ultimately left up to the Board itself. See N.C. Gen. Stat. § 163-278.68(a) ("The Board . . . shall administer the provisions of this Article."). More importantly, if plaintiffs violated the challenged statues, § 163-25 does not even come into play. As Judge Tilley recognized, if SPAC committed a violation of the statute it challenges, the 21 day provision, it would be prosecuted criminally, if at all, by the Guilford County District Attorney (after the Board of Elections conducts an investigation and refers the matter for prosecution). Jackson v. Leake, No. 1:05-CV-691, 2006 WL 2264027, *5, 7 (M.D.N.C. Aug. 7, 2006). If IEPAC violated the statutes it challenges, the reporting and rescue funds provisions, it faces civil penalties imposed by the Board of Elections (after consultation with the Guilford County District Attorney). Id. at *5. If Duke violated any of the provisions at issue he, as a judicial candidate, could be prosecuted by the District Attorney for Wake County (after the Board of Elections conducts an investigation and refers the matter for prosecution) and/or subjected to civil penalties (after the Board of Elections consulted with that District Attorney). N.C. Gen. Stat. §§ 163-278.27(b)(2), -278.34(f). The Attorney General is not directly involved in enforcing the Fund's provisions against plaintiffs. Any harm

plaintiffs suffer in relation to enforcement of the Fund is fairly traceable to the Board's conduct.

Turning to Willoughby, the District Attorney for Wake County, plaintiffs argue that they have standing to sue him given that he possesses general prosecutorial authority under N.C. Gen. Stat. § 7A-61. That statute provides in relevant part that "[t]he district attorney shall . . . prosecute in a timely manner in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of his prosecutorial district . . . ." N.C. Gen. Stat. § 7A-61. While the District Attorney for Wake County could conceivably exercise his authority under § 7A-61 to prosecute a violation the 21 day provision occurring in his district, it is highly unlikely he would do so in the absence of a report from the Board of Elections pursuant to § 163-278.27(c). The generalized duty of the District Attorney for Wake County to prosecute criminal infractions occurring in his district is not a sufficient basis to connect him to enforcement of the statute at issue. Any injury that plaintiffs might suffer as a result of his conduct is speculative.

Plaintiffs have failed to show they possess standing to sue the Attorney General and the District Attorney

for Wake County, and those defendants will be dismissed.

B. Failure to State a Claim

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the complaint is construed in the light most favorable to the non-moving party, and its allegations are taken as true. As stated by the Supreme Court:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." Revene v. Charles County Com'rs, 882 F.2d 870, 872 (4th Cir. 1989).

In conjunction with plaintiffs' preliminary injunctive relief request, the court considered the legal merits of their claims and concluded that plaintiffs

were not likely to succeed. For the reasons set forth in the order denying plaintiffs' motion for a preliminary injunction, (see 10/26/06 Order at 11-22), the court finds plaintiffs have failed to state claims against defendant members of the State Board of Elections.

III. CONCLUSION

In sum, the motions to dismiss are ALLOWED. Plaintiff Duke's claims against defendants C. Colon Willoughby, Jr. and Roy Cooper are DISMISSED for lack of standing. Plaintiff Duke's, IEPAC's, and SPAC's claims against the members of the State Board of Elections challenging N.C. Gen. Stat. §§ 163-278.12(e2)(3), 163-278.66, and 163-278.67 and the public financing scheme as a whole are DISMISSED for failure to state a claim. Plaintiffs' motion for class certification is DENIED as moot.

This 30 March 2007.

/s/W. Earl Britt
W. Earl Britt
Senior U.S. District Judge

Judgment, No. 5:06-CV-324-BR
(E.D.N.C. March 30, 2007)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Barbara Jackson, North Carolina Right to Life Committee Fund for Independent Political Expenditures, North Carolina State Political Action Committee, W. Russell Duke, Jr.,
Plaintiffs,

v.

JUDGMENT

Larry Leake, in his official capacity as the Chairperson of the North Carolina Board of Elections, Lorraine G. Shinn, in her official capacity as a member of the North Carolina Board of Elections, Charles Winfree, in his official capacity as a member of the North Carolina Board of Elections, Genevieve C. Sims, in her official capacity as a member of the North Carolina Board of Elections, Robert Cordle, in his official capacity as a member of the North Carolina Board of Elections, Roy Cooper, in his official capacity

as the Attorney General for the)
State of North Carolina, C. Colon)
Willoughby, Jr., in his official)
capacity as District Attorney for)
Wake County, Robert Stuart)
Albright, in his official capacity as)
District Attorney for Guilford)
County, and as a representative of)
the class of District Attorneys in the)
State of North Carolina, Keith M.)
Kapp, J. Michael Booe, in his official)
capacity as Vice-chairperson of the)
North Carolina Bar Administrative)
Committee, David Benbow, in his)
official capacity as a member of the)
North Carolina Bar Administrative)
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in his official capacity as a member)
of the North Carolina Bar)
Administrative Committee, Gilbert)
W. Chichester, in his official capacity)
as a member of the North Carolina)
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as a member of the North Carolina)
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Committee, Richard G. Roose, in his)

official capacity as a member of the North Carolina Bar Administrative Committee, Jan H. Samet, in her official capacity as a member of the North Carolina Bar Administrative Committee, Judy D. Thompson, in her official capacity as a member of the North Carolina Bar Administrative Committee, All Defendants, Defendants.	)	No. 5:06-CV-324-BR
and James R. Ansley and Common Cause North Carolina, Intervenor-Defendants.	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Dismiss is GRANTED IN PART, that the District Attorney for Guilford County be DISMISSED, both in his official capacity and as a representative of the class of district attorneys in the State of North Carolina, as a party to this case, that plaintiff Jackson's claims challenging N.C. Stat 163-278.12(e2)(3), 163-278.66 and 163-

278.67 and public financing scheme as a whole are DISMISSED for lack of standing. Plaintiffs Jackson's and Duke's claim challenging N.C. Stat 84-34 is DISMISSED for lack of jurisdiction. The defendants' and intervenor-defendants' motions to dismiss are ALLOWED. Plaintiff Duke's claims against defendants C. Colon Willoughby, Jr. And Roy Cooper are DISMISSED for lack of standing. Plaintiff Duke's, IEPAC's and SPAC's claims against the members of the State Board of Elections challenging N.C. Gen. Stat 163-278.12(e2)(3), 163-278.66, and 163-278.67 and the public financing scheme as a whole are DISMISSED for failure to state a claim.

This Judgment Filed and Entered on March 30, 2007 and Copies To:

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Judgment, No. 5:06-CV-324-BR
(E.D.N.C. March 30, 2007)

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March 30. 2007 /s/ DENNIS P. IAVARONE. CLERK

2008 N.C. Sess. Laws 150 (pertinent portions)

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

SESSION LAW 2008-150
SENATE BILL 1263

AN ACT TO ESTABLISH THE JOINT LEGISLATIVE ELECTIONS OVERSIGHT COMMITTEE; TO CLARIFY THE NEW ELECTION STATUTE AS IT APPLIES TO MULTISEAT RACES; TO REAUTHORIZE THE PILOT PROGRAM FOR INSTANT RUNOFF VOTING; TO AMEND THE STATUTE CONCERNING NOTICE OF AN ELECTION-PROTEST ORDER AND THE TIMING OF APPEAL; TO CLARIFY THE MEANING OF THE TERM "ELECTION" FOR PURPOSES OF THE THIRTY-DAY RESIDENCE REQUIREMENT FOR VOTING; TO RESPOND TO THE DECISION OF THE 4TH CIRCUIT U.S. COURT OF APPEALS IN NORTH CAROLINA RIGHT TO LIFE V. LEAKE; TO REPLACE THE TWENTY-ONE-DAY CONTRIBUTION EMBARGO IN THE JUDICIAL PUBLIC CAMPAIGN PROGRAM WITH AN EXPEDITED RELEASE OF MATCHING FUNDS; TO EXEMPT CERTAIN SALES OF GOODS OR SERVICES BY POLITICAL PARTY EXECUTIVE COMMITTEES FROM CERTAIN CONTRIBUTION REQUIREMENTS; TO REQUIRE ALL TREASURERS TO REPORT ACCORDING TO THE MUNICIPAL

2008 N.C. Sess. Laws 150 (pertinent portions)

CAMPAIGN REPORTING SCHEDULE IF THEIR CANDIDATES OR COMMITTEES PARTICIPATE IN MUNICIPAL ELECTIONS; TO PROHIBIT COMMINGLING OF CAMPAIGN FUNDS; TO REQUIRE THAT NEW-PARTY CANDIDATES BE REGISTERED WITH THE PARTY; TO AMEND THE REPORTING REQUIREMENT FOR MATCHING FUNDS IN PUBLIC FINANCING PROGRAMS; TO LIMIT THE PROHIBITION IN THE ELECTIONEERING COMMUNICATIONS STATUTES; AND TO REQUIRE FORTY-EIGHT-HOUR REPORTS FOR ANY CONTRIBUTION OF LATE CONTRIBUTIONS OF MORE THAN ONE THOUSAND DOLLARS, REGARDLESS OF THE SOURCE; AND TO MAKE RELATED CHANGES.

The General Assembly of North Carolina enacts:

. . . .

SECTION 7.(a) G.S. 163-278.13(e2)(3) is repealed.

SECTION 7.(b) G.S. 163-278.67 is amended by adding a new subsection to read:

"(c1) Expedited Distribution of Matching Funds. – When a candidate becomes entitled to any amount of matching funds under subsection (a) of this section, the Board shall authorize the issuance of that amount

to the candidate as soon as practicable. The Department of Administration shall transfer that amount to the candidate as soon as practicable and in no event later than 12 hours after receiving notice from the Board that the candidate has become entitled to it. The Department of Administration shall develop a method of rapidly transferring funds to a candidate or otherwise fulfilling the requirements of this subsection in conjunction with the Board. The candidate shall return to the Board as soon as practicable any amount of the matching funds that the candidate has not spent at the date of the election or at the time the individual ceases to be a certified candidate, whichever occurs first."

SECTION 7.(c) This section is effective when it becomes law.

. . . .

SECTION 10.2.(a) G.S. 163-278.66(a) reads as rewritten:

"(a) Reporting by Participating and Certified Candidates. Reporting by Noncertified Candidates and Other Entities. – Any noncertified candidate with a certified opponent shall report total ~~income, expenses, and obligations~~ contributions received to the Board by facsimile machine or electronically within 24 hours after the total amount of ~~campaign expenditures or obligations made, or funds raised or borrowed,~~

contributions received exceeds eighty percent (80%) of the trigger for matching funds as defined in G.S. 163-278.62(18). Any entity making independent expenditures in support of or opposition to a certified candidate or in support of a candidate opposing a certified candidate, or paying for electioneering communications, referring to one of those candidates, shall report the total ~~funds received, spent, or obligated for those~~ expenditures or payments made to the Board by facsimile machine or electronically within 24 hours after the total amount of expenditures ~~or obligations made, or funds raised or borrowed,~~ or payments made for the purpose of making the independent expenditures or electioneering communications exceeds five thousand dollars ($5,000). After ~~this~~ the initial 24-hour filing, the noncertified candidate or other reporting entity shall comply with an expedited reporting ~~schedule by filing additional reports after receiving each additional amount in excess of one thousand dollars ($1,000) or after making or obligating to make each additional expenditure(s) or payment(s) in excess of one thousand dollars ($1,000).~~ schedule. The schedule and forms for reports required by this subsection shall be ~~made according to procedures developed~~ supplied by the Board."

. . . .

2008 N.C. Sess. Laws 150 (pertinent portions)

SECTION 10.2.(c) This section is effective when it becomes law.

In the General Assembly read three times and ratified this the 18th day of July, 2008.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 8:34 p.m. this 2nd day of August, 2008

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No. 08-120

Supreme Court, U.S.
FILED
OCT 6 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

W. RUSSELL DUKE, JR., AND NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT EXPENDITURES, *Petitioners,*

v.

LARRY LEAKE ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Reply To Respondents' Brief in Opposition

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Table of Authorities

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Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) *passim*

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Constitution, Statutes, Regulations & Rules

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N.C. Gen. Stat. § 163-278.66(a) 6

Reply to Respondents' Brief in Opposition

I. A Circuit Split Exists Regarding Rescue Funds.

Respondents contend that a writ of certiorari is not appropriate in this case because no conflict has yet had an opportunity to present itself regarding the application of *Davis v. FEC*, 125 S. Ct. 2759 (2008) and public financing schemes such as the one at issue here. Br. in Opp. at 21. Respondents misconstrue the circuit split analysis.

Even if *Davis* were inapplicable as directly relevant precedent, a circuit split still remains on the constitutionality of rescue funds. The court below recognized this in its opinion:

> There is some conflict in the circuits as to whether the provision of matching funds burdens or chills speech in a way that implicates the First Amendment. The Eighth Circuit struck down a matching funds provision, reasoning that the potential 'self-censorship' created by the scheme 'is no less a burden on speech . . . than is direct government censorship.' *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994). The First Circuit, on the other hand, explicitly rejected the 'logic of *Day*' by holding that the provision of matching funds 'does not create a burden' on the First Amendment rights of nonparticipating candidates or independent entities." *Daggett*, 205 F.3d at 464-65; *see also Gable*, 142 F.3d at 947-49 (Sixth Circuit upholding a matching funds scheme against a constitutional challenge

without addressing the *Day* analysis).

North Carolina Right To Life Committee Fund For Independent Political Expenditures v. Leake, 524 F.3d 427, 437 (4th Cir. 2008). This split is made more poignant by this Court's recent *Davis* decision, which lends credibility to the *Day* analysis despite circuit court opinions to the contrary. *See Davis*, 128 S.Ct. at 2772. And it is in resolving this circuit split that *Davis* provides valuable guidance.

The *Davis* decision looks to *Day* favorably in its burden analysis. *Davis*, 128 S. Ct. at 2772. Given this, the circuit courts' decisions to dismiss the reasoning of *Day* need to be reconciled, if not vacated. In *Daggett*, the First Circuit stated, "We cannot adopt the logic of *Day*, which equates responsive speech with an impairment." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 465 (1st Cir. 2000). In *Gable*, the Sixth Circuit ignored the *Day* decision entirely in upholding Kentucky's rescue funds scheme. *Gable v. Patton*, 142 F.3d 940, 949 (6th Cir. 1998). Time and again, the circuit courts have either chosen not to follow *Day*, or have ignored the *Day* decision entirely. This, in conjunction with this Court's recognition of the legitimacy of *Day*'s rationale on burden analysis, warrants a closer look at this issue by this Court. Whether North Carolina's rescue funds are constitutional is an issue that exists with or without this Court's decision in *Davis*, and in either event justifies a grant of certiorari.

II. This Court Should Resolve *Davis*' Implications For Public Financing Schemes.

Respondents contend that *Davis* does not necessi-

tate a different result in this case because it is inapplicable. They present two reasons. First, they argue that the speech burdens recognized in *Davis* are not present in public financing schemes, contending that candidates in public financed races are not similarly situated, as they were in *Davis*. Nothing in *Davis* requires a candidate to be similarly situated as her opponents in order to assert a burden on her free speech rights. While the Court recognized that raised contribution limits for all candidates could not burden a candidate, *id.* at 2770, it found that a unilateral raised contribution level amounted to penalty upon a opponent candidate's expenditures by "requir[ing] a candidate to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.* at 2771. The capacities of the other candidates for office have no bearing upon the credibility of the burden placed upon a candidate seeking relief from it. It is the burden on the candidate, not the analogous posture of candidates that is relevant to First Amendment free speech challenges.

In as much as candidates in North Carolina are similarly situated, it is in this way: upon electing to run for judicial office, candidates must choose between exercising their right to speak subject to significant burdens should their spending exceed a set amount, or waiving their right to associate through contributions by participating in the public financing scheme. Notably, no option for "unfettered political speech" is available to candidates. In this way, it is not voluntary, as Respondents suggest—regardless of the choice made by the candidate, they forfeit or are penalized for

exercising their First Amendment rights.

Respondents then proceed to cite this Court's decision in *Buckley* to uphold the public funding scheme in that case. Br. in Opp. at 15. Respondents fail to recognize that significant distinctions exist between the type of public funding scheme at issue in *Buckley* and that employed by North Carolina. If the situation before this Court were one of candidates choosing between running for office with their First Amendment rights fully intact and ceding some of their rights for financial benefit, this matter would most likely fall under the purview of *Buckley*. However, as stated above, this case involves a circumstance where, regardless of which type of campaign judicial candidates such as Duke decided to run—publicly or privately financed—they forfeit, or at least risk forfeiting, some of their speech rights. Indeed, Respondents recognize that the nature of North Carolina's scheme is precisely this, noting that each candidate must weigh the burdens and benefits of each option before "voluntarily" choosing one or the other. Br. in Opp. at 14. In this context, the voluntary component of the scheme, present in *Buckley*, vanishes and makes its resemblance to *Davis* that much more acute:

> In *Buckley*, a candidate, by foregoing public financing, could retain the unfettered right to make unlimited personal expenditures. Here, § 319(a) does not provide any way in which a candidate can exercise that right without abridgement. Instead, a candidate who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the

> activation of a scheme of discriminatory contribution limits. The choice imposed by § 319(a) is not remotely parallel to that in *Buckley*.

Davis, 128 S. Ct. at 2772. This is precisely the dynamic created by North Carolina's rescue funds.

Respondents press the *Buckley* analogy further by contending that if one distribution of funds at the outset is constitutional, then incremental distributions of fund is constitutional. Br. in Opp. at 15. Respondents again miss the mark. North Carolina's public financing scheme does not merely disperse finances in predetermined amount within a predetermined time frame. Rather, after the initial distribution, the scheme makes subsequent financing solely and completely contingent upon a nonparticipating candidates' speech. Such contingencies were deemed by the *Davis* Court as penalties and burdens on speech.[1]

Ultimately, the relevance of *Davis* to this matter is in its assertion that imposing a "special and significant burden" on candidates for choosing to exercise their rights "result[s] in a drag on First Amendment rights," regardless of the statutory imposition of the choice. *Id.* at 2772. In advancing this larger principle, the Court cites *Day*. Both cases stand for the proposition that campaign regulations cannot create benefits to one

---

[1]Respondents argue that such distributions are required to make public financing meaningful. But that merely suggests that public financing in its own right may not serve the interests it purports to serve. Imposing burdens upon nonparticipating candidates to make it meaningful does not negate the unconstitutionality of such burdens.

candidate contingent upon a burden placed upon the exercise of free speech rights of her opponent or, in the case of *Day*, independent expenditures. *Id.* at 2772 (*citing Day*, 34 F.3d at 1359-60).

This is precisely what is occurring here: Duke and IEPAC's speech would cause his opponent to receive a benefit, effectively penalizing their speech. This is only exacerbated by reporting requirements designed to notify the State when this penalty is to take effect. This penalty burdens core political speech.

Because of the gravity of the burden upon both candidate and independent spenders' speech—the rescue funds punitive structure effectively chills speech from the outset—regulations creating this burden are subject to strict scrutiny, as Respondents note. *Davis*, 128 S. Ct. at 2775; Br. in Opp. at 17. Just like the reporting requirements for the asymmetrical contributions limits in *Davis*, North Carolina's disclosure requirements were designed to implement the rescue funds. The Board is free to determine at its discretion how many reports must be filed by nonparticipating candidates, and at what time. G.S. § 163-278.66(a). Because the scheme itself is unconstitutional, so too is the reporting requirement. *See id.* at 2775. And, as demonstrated in Petitioners' opening brief, no other interest is served by the disclosure requirements.[2]

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[2]Respondents contend that a more developed factual record would demonstrate that the necessary compelling interests exist. Br. in Opp. at 19. However, because the regulation involves expenditures of candidates and independent spenders of their own finances and not contribution sources, further factual analysis

Second, Respondents contend that lower courts have not had adequate opportunity to determine Davis' applicability to public financing schemes. Br. in Opp. at 21. Yet, lower courts have already begun to recognize its significance in the public financing context. For example, in *McComish v. Brewer*, No. 2:08-cv-01550 (D. Ariz., filed Aug. 21, 2008), the court, though denying a request for a temporary restraining order against public financing provisions of Arizona's Clean Election Act, recognized the merits of Plaintiffs' claims under *Davis*. *See id.* (Doc. 30 at 6-8). Moreover, *Davis* articulated support for *Day*'s rationale, rationale that the Fourth Circuit and other circuit courts have had adequate time to consider and declined to follow. *See supra* Part I.

That *Davis* is not relevant in this case and that it was not intending to support *Day*'s rationale that public financing schemes impose unconstitutional burdens on nonparticipating candidates and independent spenders is far from obvious, and appears to be quite the opposite. Clarification on this point alone warrants a grant of certiorari.

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will not bear out a legitimate anti-corruption interest, as such expenditures are not corruptive. *See Davis*, 128 S. Ct. at 2773.

Conclusion

For the foregoing reasons, this Court should issue the requested writ of certiorari and decide this matter on the merits. In the alternative, this Court should grant the writ, vacate and remand this matter to the Fourth Circuit for reconsideration in light of this Court's decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008).

Respectfully submitted,

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In The
Supreme Court of the United States

W. RUSSELL DUKE, JR., AND NORTH CAROLINA RIGHT TO LIFE COMMITTEE FUND FOR INDEPENDENT EXPENDITURES,

Petitioners,

v.

LARRY LEAKE, Et Al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF DEAN MARTIN, THE ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, AND ARIZONA TAXPAYERS ACTION COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI*

Pursuant to Supreme Court Rule 37.2, the plaintiffs in *Martin v. Brewer*, an on-going federal court challenge to Arizona's scheme of publicly funding political campaigns, respectfully submit this *amicus curiae* brief in support of Petitioners.[1]

Dean Martin is a resident of the State of Arizona, the current Arizona State Treasurer, and a former member of the Arizona State Senate. In each of Martin's privately funded electoral bids, he has been subject to Arizona's so-called Citizens Clean Elections Act, Ariz. Rev. Stat. Ann. "A.R.S." § 16-940 *et seq.*, a government program for fully funding statewide and legislative political campaigns with public money. Martin, along with several other candidates and an Arizona political committee, filed a First Amendment challenge to Arizona's public campaign finance scheme in January 2004, arguing that it penalized his nonparticipation by triggering additional government funds to his opponent, or opponents, based on his decision to robustly exercise his right to speak.[2]

---

[1] The *Amici* have received consent from counsel of record pursuant to Sup. Ct. R. 37.2, as submitted with this brief. The *Amici* affirm, pursuant to Sup. Ct. R. 37.6, that no counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

[2] The other original plaintiffs were eventually dismissed by the Ninth Circuit on mootness grounds. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 486 F.3d 586 (9th Cir. 2007).

Like the Petitioners in the present case, Martin's case was originally dismissed pursuant to a Fed. R. Civ. P. 12(b)(6) motion, thus precluding him from fully litigating his free speech claims. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005). The Court of Appeals for the Ninth Circuit reversed the dismissal and remanded so that Martin may fully develop the fact record. *Ass'n of Am. Physicians & Surgeons v. Brewer*, 494 F.3d 1145 (9th Cir. 2007), *and amending order*, 497 F.3d 1056 (9th Cir. 2007) ("Dean Martin's complaint 'seeking an injunction against the enforcement of *A.R.S. § 16-940 et. seq.* states a cause of action'").

The Arizona Free Enterprise Club's Freedom Club PAC (the "Freedom Club PAC") is an independent group established as a Candidate Support or Opposition Committee under Arizona law. A.R.S. § 16-912. The Freedom Club PAC receives contributions for, and makes contributions to, independent expenditure campaigns in various state and legislative races. Similarly, the Arizona Taxpayers Action Committee ("Action Committee") is an Independent Expenditures Committee organized under Arizona law. A.R.S. § 16-912. The Action Committee receives contributions for and makes independent expenditures in state and legislative races as well as in ballot-measure campaigns. Both committees joined Martin's suit upon remand because their independent expenditures have triggered payment of government funds to candidates opposed by the committees and their donors.

While the Arizona plaintiffs agree entirely with the Petition filed in this case, they believe that their experience with taxpayer funded campaigns, and their familiarity with the federal courts' treatment of challenges to such programs, will provide additional insight useful to this Court's consideration of the Petition.

SUMMARY OF ARGUMENT

This case presents an opportunity for this Court to resolve no less than three significant circuit splits and to clarify its precedents on the proper standards for motions to dismiss in First Amendment cases. *See* Sup. Ct. R. 10(a), (c). First, the Fourth Circuit's decision contradicts the decision of the Ninth Circuit in *Amici*'s case, which held that *Amici*'s similar challenge *did* state a cause of action. *See* Sup. Ct. R. 10(a). Second, the Fourth Circuit's dismissal of Petitioners' as-applied challenge conflicts with the First Circuit's instruction that future courts hold open the door to as-applied challenges to public campaign finance schemes. *Id.* Third, the First and Eighth Circuits are split on the constitutionality of public campaign finance schemes that utilize matching funds provisions. *Id.* Finally, the Fourth Circuit's decision is inconsistent with this Court's precedents on the evidentiary burden, and who bears that burden, in cases challenging campaign finance laws. *See* Sup. Ct. R. 10(c).

Like the Petitioners, the *Amici*'s initial foray into the federal courts saw their First Amendment claims dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See Ass'n of Am. Physicians and Surgeons v. Brewer*, 363 F. Supp. 2d 1197. Other federal courts have likewise dismissed challenges to public campaign finance programs based not on empirical evidence or concrete proof, but simply based on the governments' assertion that such programs are sufficiently tailored to serve a purported governmental interest. These cases have been dismissed even when the plaintiffs brought as-applied challenges to discrete provisions of the public campaign finance scheme. In so doing, the courts either disregarded, or refused to believe, plausible allegations by plaintiffs that public campaign finance schemes interfere with their First Amendment rights.

This method of constitutional adjudication is inconsistent with this Court's precedents and the requirements of both the First Amendment and the Federal Rules of Civil Procedure. As Petitioners correctly point out, this disconnect is even more pronounced in light of this Court's recent decisions regarding campaign finance laws. Once plaintiffs plead colorable harm to their right of free speech, this Court's precedents, the First Amendment, and the Federal Rules of Civil Procedure require *the government* to prove that its actions are sufficiently tailored to meet the government interest asserted. That proof cannot consist of simply *ipse dixit* assertions that the law in question does what the government wants it to do.

The Fourth Circuit's decision, if allowed to stand, would reinforce precedent erroneously holding that when it comes to campaign finance laws, what the government asserts is a verity and what the plaintiffs say cannot be believed. The Fourth Circuit's decision conflicts with relevant decisions of this Court regarding the consideration of First Amendment claims. This Court should therefore accept review and reaffirm its clear guidelines for consideration of colorable claims alleging governmental interference with fundamental First Amendment rights.

REASONS FOR GRANTING REVIEW

I. THE FOURTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND CONTRADICTS THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

This case will affect the ability of future litigants who claim that their First Amendment rights are violated by public campaign finance schemes to have their full day in court. In terms of ensuring the vitality of free and robust political debate in this country, the optimal result here would be for this Court to grant the Petition and invalidate these schemes altogether. At the very least, however, this Court should provide guidance to district courts when considering claims challenging these unproven laws, an action of urgent public import given that these laws – which fundamentally restructure campaigns to

allow the government to decide how much speech is too much in a campaign – are becoming increasingly common nationwide.

A. Public Campaign Finance Schemes Are Increasing In Number.

Numerous states and municipalities have adopted, or are considering adopting, programs to fund political campaigns with public moneys, in stark contrast to our national tradition of candidates raising funds from people who support their message. Increasingly, these systems feature so-called "matching funds" provisions. Typically, the receipt of government funding is first conditioned on a candidate's agreement to cap campaign expenditures to a set amount of money. However, if a publicly financed candidate faces a privately financed opponent, the government will provide extra funds to the publicly financed candidate when some combination of the privately financed candidate's expenditures, or expenditures by independent groups that either (1) support the privately financed candidate or (2) oppose the publicly financed candidate, exceeds the publicly financed candidate's agreed-to expenditure limit.

Jurisdictions that have already adopted public campaign finance statutes include statewide programs in North Carolina, N.C. Gen. Stat. § 163-278.61, *et seq.*, Arizona, A.R.S. § 16-940 *et seq.*, Connecticut, Conn. Gen. Stat. § 9-700, *et seq.*, New Mexico, N.M. Stat. 1-19A-1, *et seq.*, and Maine, Me. Rev.

Stat. Ann. tit. 21-A, § 1121; and municipal campaigns in cities such as Albuquerque, New Mexico, Article XVI, Charter of the City of Albuquerque, Tucson, Arizona, Tucson City Code, Ch. XVI, Sub. B, and Portland, Oregon, Portland City Code, Ch. 2.10. Jurisdictions presently considering publicly funding political campaigns include New Jersey, Assem. B. 100, 213th Leg., First Ann. Sess. (2008), and Maryland, H.B. 971, 425th Sess., Gen. Assem. (2008); and municipalities such as Seattle, Resolution No. 31061, and King County, Washington, KC 2007-0430.2.[3]

The Petitioners in this case filed a complaint alleging that the matching funds provision of North Carolina's public campaign finance scheme for judicial races burdens the First Amendment rights of privately funded candidates and independent groups. *See* N.C. Gen. Stat. § 163-278.67(a). Petitioners also challenged the North Carolina law's lopsided reporting requirements that require privately financed candidates to file extra reports in order to provide the government with the information it needs to pay out the matching funds. *See* N.C. Gen. Stat. § 163.278.66(a). The Petitioners never got their day in court. Instead, the district court dismissed Petitioners' complaint pursuant to Fed. R. Civ. P. 12(b)(6). *See Jackson v. Leake*, 476 F. Supp. 2d 515 (E.D.N.C. 2006).

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[3] New Jersey's Office of Legislative Services opined on July 21, 2008 that matching funds provisions similar to those challenged in this case are unconstitutional. *See* App. 1.

B. Litigants Challenging Public Campaign Finance Schemes Have Not Been Given Their Day In Court.

This result was, unfortunately, not unique. Increasingly, district courts are summarily disposing of First Amendment challenges to public campaign finance systems by granting Rule 12(b)(6) motions to dismiss. *See, e.g., Green Party of Connecticut v. Garfield,* 537 F. Supp. 2d 359 (D. Ct. 2008); *Ass'n of Am. Physicians v. Brewer*, 363 F. Supp. 2d 1197 (D. Ariz. 2005); *Wilkinson v. Jones,* 876 F. Supp. 916 (W.D. Ky. 1995). This is an alarming trend that contravenes well-established principles of law governing motions to dismiss, especially in cases where plaintiffs allege the government has interfered with their fundamental right to freely speak.

Included in this recent spate of dismissals is the Arizona district court in which Dean Martin filed his challenge to Arizona's public campaign finance scheme. *Brewer,* 363 F. Supp. 2d at 1198. In Martin's case, the Court of Appeals for the Ninth Circuit reversed the order of dismissal and remanded his case so that he may fully develop the fact record to prove that Arizona's public financing scheme unconstitutionally burdens his speech.[4] *Ass'n of Am.*

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[4] The Ninth Circuit's decision accords with this Court's decision in *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, ___, 128 S. Ct. 1184, 1191 (2008), which held that courts should not " 'formulate a rule of constitutional law broader than is required by the precise facts to which

(Continued on following page)

Physicians & Surgeons v. Brewer, 494 F.3d 1145 (9th Cir. 2007), *and amending order*, 497 F.3d 1056 (9th Cir. 2007) ("Dean Martin's complaint 'seeking an injunction against the enforcement of *A.R.S. § 16-940 et. seq.* states a cause of action'").

In Petitioners' case, the district court's error was compounded by the Fourth Circuit's error. Other than noting the standard of review, the Fourth Circuit did not cite, discuss, or apply the legal standards that govern federal courts when deciding a motion to dismiss. *North Carolina Right to Life Comm. Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 431-441 (4th Cir. 2008), Pet. App. at 3a. When considering whether to grant a motion to dismiss, it is well settled that a district court must accept as true all factual allegations of the complaint. *Erickson v. Pardus*, 551 U.S. ___, ___, 127 S. Ct. 2197, 2200 (2007). Therefore, "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, ___, 127 S. Ct. 1955, 1965 (2007) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 1832 (1989)).

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it is to be applied'" (quoting *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936)); *see also Randall v. Sorrell*, 548 U.S. 230, 253, 126 S. Ct. 2479, 2494 (2006) ("examin[ing] the record independently and carefully to determine whether [the challenged] contribution limits [we]re 'closely drawn' to match the State's interests").

Unlike the Ninth Circuit, however, the Fourth Circuit affirmed the district court's order dismissing Petitioners' case. *Leake*, 524 F.3d at 432; Pet. App. at 1a. The Ninth and Fourth Circuits are thus split on the question of whether a plaintiff may state a claim for relief from a matching funds provision that discourages speech or penalizes the exercise of speech. In light of the many jurisdictions considering public financing schemes, this Court needs to resolve this circuit split and, at the very least, require that district courts considering challenges to such schemes do so in a manner consistent with well-settled principles governing First Amendment law and the Federal Rules of Civil Procedure.

C. Federal Courts Are Mis-Applying The Standard For Motions To Dismiss In Challenges To Public Campaign Finance Schemes.

The Petitioners alleged that "they would have made contributions and expenditures but for the challenged provisions." *Leake*, 524 F.3d at 435; Pet. App. at 9a. They should have been afforded an opportunity to introduce evidence to prove that North Carolina's matching funds provision was the cause of their self-censorship. But the district court simply did not believe Petitioners' factual allegations. In denying Petitioners' motion for preliminary injunction, the district court held: "The public funding system in no way limits the quantity of speech one can engage in or the amount of money one can spend engaging in

political speech, nor does it threaten censure or penalty for such expenditures." *Jackson v. Leake*, 476 F. Supp. 2d 515, 529 (E.D.N.C. 2006), Pet. App. at 52a. After denying Petitioners' motion for preliminary injunction, the district court granted the government's motion to dismiss. *Leake*, 524 F.3d at 432; Pet. App. at 1a.

Petitioners, like the Arizona plaintiffs, should have had an opportunity to actually *prove* that what they alleged was true and the governmental officials being sued should have been required to demonstrate that their promises of the multitude of benefits provided by public financing schemes had some basis in reality, like the Ninth Circuit is requiring the State of Arizona to do in *Amici*'s case.

Whether or not North Carolina's public campaign finance scheme limits or penalizes speech are questions of fact that are readily susceptible of proof. For example, campaign finance reports filed before and after public funding was enacted could be analyzed to discern what affect the system has had on speech. Further, in order to determine if the scheme is narrowly tailored, data could be collected to determine to what extent the public campaign finance scheme advances its purported goals.

Because of the existence of these types of fact questions, which have so far gone unanswered in Petitioners' case, a district court must not ask, "whether a plaintiff will ultimately prevail." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686

(1974). Rather, the district court should ask, "whether the claimant is entitled to offer evidence to support the claims." *Id.* This Court summarized these two principles recently, saying: "when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, ___, 127 S. Ct. 1955, 1969, n.8 (2007).

In each of the public campaign finance challenges listed above, and in Petitioners' case before the Fourth Circuit, the district court turned these principles on their head. The district courts did not believe the plaintiffs when they said these schemes interfere with and burden their First Amendment rights. *See, e.g., Green Party of Connecticut v. Garfield*, 537 F. Supp. 2d 359, 392 ("I hold that the triggers do not actually burden the exercise of political speech"). *Amici* therefore urge this Court to announce clear rules for evaluating motions to dismiss in the public campaign finance context, and to foreclose future district courts from dismissing colorable First Amendment challenges to such schemes.

D. Well-Established First Amendment Jurisprudence Places The Burden On The Government To Justify Infringing First Amendment Rights.

In the context of challenging a public campaign finance scheme's matching funds provision, and its accompanying reporting requirements, a plaintiff makes a colorable First Amendment claim if he or she alleges that the matching funds burden speech by either (1) discouraging constitutionally protected speech; or (2) penalizing the plaintiff for exercising free speech rights. *See Davis v. FEC*, ___ U.S. ___, ___, 128 S. Ct. 2759, 2771 (2008).

Petitioners' complaint plausibly alleges that North Carolina's matching funds provision chills and penalizes the exercise of their free speech rights. The Petitioners have thus stated a colorable claim and they deserve an opportunity to present evidence to support their claims. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) ("The issue is not whether the Plaintiff ultimately will prevail, but whether he is entitled to offer evidence to support his claim") (citation omitted); *see also FEC v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, ___, 127 S. Ct. 2652, 2659 (2007) (*WRTL II*) ("[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it").

There is a mistaken consensus developing in the federal district courts, now sanctioned by the Fourth Circuit, that absent a direct dollar limit on the

amount of money that privately financed candidates and independent groups can expend in a political campaign, no valid claim can be stated against matching funds provisions. But the First Amendment's reach goes beyond direct limits, to any law that curtails speech, even laws that limit speech indirectly. *See Smith v. Allwright*, 321 U.S. 649, 664, 64 S. Ct. 757, 765 (1944) (noting that "Constitutional rights would be of little value if they could be . . . indirectly denied") (citation omitted).

In that regard, taking a government's unrebutted assertions of the benefits of a campaign finance law, while disbelieving the allegations of plaintiffs asserting colorable First Amendment claims, and granting a motion to dismiss on this basis, flatly contradicts not only well-settled principles of civil procedure, but also this Court's decisions in *FEC v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S. Ct. 2652 (2007), and *Randall v. Sorrell,* 548 U.S. 230, 126 S. Ct. 2497 (2006). In each of those cases, this Court took pains to stress that it is the *government's* burden to prove that campaign finance regulations are narrowly tailored. Thus, any analysis of a campaign finance law that a plaintiff alleges reduces, curtails, or diminishes the quantity of political speech in an election, whether by direct or indirect means, must be supported by proof provided by the government and, by its very nature, can almost never be the subject of a successful motion to dismiss.

II. THE FOURTH CIRCUIT'S DECISION AFFIRMING THE DISMISSAL OF PETITIONERS' AS-APPLIED CHALLENGE TO A PUBLIC CAMPAIGN FINANCE SCHEME CONTRADICTS THE FIRST CIRCUIT'S *DAGGETT* DECISION WHICH EXPLICITLY LEFT OPEN FUTURE AS-APPLIED CHALLENGES.

The Petitioners' complaint states both a facial and an as-applied challenge to North Carolina's public campaign finance scheme.

Two Circuit Courts of Appeal have considered pre-implementation facial challenges to matching funds provisions in public campaign finance schemes – and come to differing conclusions as to their constitutional validity. *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994) (striking down matching funds provision on its face); and *Daggett v. Comm'n on Governmental Ethics and Election Practices,* 205 F.3d 445, 472 (1st Cir. 2000) (upholding matching funds provision on its face).

Considering this unresolved circuit split, and this Court's adoption of *Day*'s logic in *Davis v. FEC*, ___ U.S. ___, ___, 128 S. Ct. 2759, 2772, the state of the law concerning the facial validity of matching funds provisions is clearly "unsettled." *See infra,* Part III. "[W]here the substantive law is unsettled, it is advisable to hold that a complaint should not be held without merit unless it is absolutely clear that no cause of action could be stated given the actual facts[.]" *Builders Corp. of Am. v. U.S.*, 259 F.2d 766,

771 (9th Cir. 1958). The Petitioners' facial claim should have been allowed to proceed.

Of course, Petitioners' as-applied challenges would not be resolved even if the North Carolina scheme were to be upheld against a facial challenge. *FEC v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, ___ 127 S. Ct. 2652, 2659 (2007) (*WRTL II*); *Citizens for Responsible Gov't State Political Action Comm. v. Buckley*, 60 F. Supp. 2d 1066, 1073 (D. Colo. 1999) (noting that "[a]n 'as applied' challenge . . . asserts that the statute is unconstitutional as applied to a particular plaintiff's speech activity, even though the statute may be valid as applied to other parties"); *Daggett*, 205 F.3d 445, 472 (noting that "[a]lthough we indicate no opinion as to the success that an as-applied challenge would meet in the future, that door remains open").

Yet, since *Daggett*, it appears that every court to consider a complaint alleging that a public campaign finance law's matching funds provision violates the First Amendment has dismissed the case without considering the facts as-applied to the challenged law. *Green Party of Connecticut v. Garfield,* 537 F. Supp. 2d at 392; *Jackson v. Leake*, 476 F. Supp. 2d at 530; *Ass'n of Am. Physicians & Surgeons v. Brewer,* 363 F. Supp. 2d at 1203. The First Circuit in *Daggett* did not purport to resolve future as-applied challenges to public campaign finance schemes. Instead, the First Circuit went out of its way to clarify that its decision

was based purely on the face of Maine's public campaign finance scheme. *Daggett,* 205 F.3d at 472.

The First Circuit emphasized that the door to future as-applied challenges "remains open" and then issued a "call for vigilant monitoring" emphasizing that experience "will be our best teacher." *Id.*

This Court generally disfavors facial challenges because "they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'" *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, ___, 128 S. Ct. 1184, 1191 (2008) (quoting *Sabri v. United States*, 541 U.S. 600, 609, 124 S. Ct. 1941, 1948 (2004)) (also noting that facial challenges are contrary to the principle that "courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'" (quoting *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936))). Thus, even if a campaign finance law, on its face, will inhibit some constitutionally protected speech, a plaintiff attempting to establish that "*all* enforcement of the law should therefore be prohibited" carries a "heavy burden." *FEC v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, ___ 127 S. Ct. 2652, 2659 (2007); *see also Crawford v. Marion County Election Bd.*, ___ U.S. ___, ___, 128 S. Ct. 1610, 1621 (2008) (plurality opinion) (noting that plaintiffs who assert a facial claim "that would invalidate the statute in all its applications . . . bear a heavy burden of

persuasion"); *see also Washington State Grange*, ___ U.S. at ___, 128 S. Ct. at 1187 (noting that "factual assumptions . . . can be evaluated only in the context of an as-applied challenge").

This Court should grant review to clarify that in the context of an as-applied challenge to a public campaign finance scheme, it is inappropriate to dismiss the case before a plaintiff is permitted to develop the facts and certainly not before the government has offered something more than naked assertions without any proof of its own.

III. THERE IS A CIRCUIT SPLIT ON WHETHER MATCHING FUNDS PROVISIONS UNCONSTITUTIONALLY BURDEN FIRST AMENDMENT RIGHTS BY SUBSIDIZING THE OPPONENTS OF PRIVATELY FINANCED CANDIDATES AND INDEPENDENT POLITICAL GROUPS BASED ON THEIR DECISION TO EXERCISE THEIR FREE SPEECH RIGHTS.

There is no question that the First Amendment protects the Petitioners' speech. The Petitioners are a judicial candidate and an independent-expenditure committee. Their speech involves the "qualifications of candidates" and is at the core "of the First Amendment freedoms." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 233, 109 S. Ct. 1013, 1020 (1989). "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Id.* (quoting

Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S. Ct. 621, 625 (1971)).

Public campaign finance schemes pay matching funds so that publicly financed candidates can counter speech intended to defeat them. Matching funds provisions thus require privately financed candidates and independent groups to either agree to limit their expenditures or risk triggering the disbursement of public funds to the candidate they oppose. In this way, matching funds provisions impose a penalty on any privately funded candidate or independent group who robustly exercise their First Amendment rights. Many candidates and groups may choose to speak despite the matching funds, but when they speak they "shoulder a special and potentially significant burden." *Davis v. FEC*, ___ U.S. ___, ___, 128 S. Ct. 2759, 2772 (citing *Day v. Holahan*, 34 F.3d 1356, 1359-1360).

In *Day v. Holahan*, the Eighth Circuit struck down the matching funds provision in Minnesota's public campaign finance scheme. 34 F.3d at 1366. Minnesota's independent expenditure matching law was less burdensome than North Carolina's matching funds provision. Minnesota's law only matched independent expenditures by one-half the amount spent to advocate the publicly financed candidate's defeat (while also increasing that candidate's spending limits). *Id.* at 1359. North Carolina's scheme matches the independent expenditure dollar-for-dollar and increases the government funded candidate's expenditure limit by

the amount of matching funds issued. N.C. Gen. Stat. § 163-278.67(a).

In *Day*, the Eighth Circuit examined the effect on independent expenditures when the government pays matching funds to the political candidates whose election the independent expenditure is designed to defeat. 34 F.3d at 1359. Not surprisingly, the court found that the threat of triggering payments to government funded candidates caused independent groups to self-censor. *Day*, 34 F.3d at 1360. This is because

> [t]he knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech. *Id.*

The First Circuit confronted a similar challenge to Maine's matching funds provision, but declined to adopt *Day*'s sound logic. The First Circuit in *Daggett*, 205 F.3d at 472, upheld a matching funds provision nearly identical to the North Carolina provision that Petitioners challenge in this case.

The First Circuit's rejection of *Day* is premised on the oft-quoted proposition that under the First Amendment, individuals "have no right to speak free from response." *Daggett*, 205 F.3d at 464. *Amici* agree that the First Amendment does not protect a right to

speak free from response. But objecting to being "directly responsible for adding to" the campaign coffers of a candidate the speaker opposes is a far cry from asserting a right to speak free from response. *Day*, 34 F.3d at 1360.

The First Circuit failed to account for the true cost to candidates and independent groups of triggering matching funds when they speak out against a government funded candidate: namely, there is a chilling effect on the exercise of constitutionally protected speech when the direct result of that speech is to provide one's opponent with a large cash subsidy.

The governmental purpose justifying matching funds provisions is to equalize the relative financial resources of publicly and privately funded candidates. Public campaign finance schemes intend to level the playing field so that privately financed candidates do not outspend their government funded opponents.[5] But leveling the resources of competing speakers is not a legitimate governmental purpose. Indeed, as this Court recently recognized in *Davis v. FEC*, it is a concept "'wholly foreign to the First Amendment.'"

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[5] One candid proponent of King County, Washington's proposed public campaign finance scheme said that matching funds will have "the benefit of discouraging me from raising a whole bunch of money because I know you're going to get the same amount and so it's a level playing field at whatever that amount is." Transcript of Interview with K.C. Councilman Bob Ferguson, http://www.kingcounty.gov/Ferguson/Multimedia/transcript/ComcastNewsmakers.aspx?print=1.

Davis, ___ U.S. at ___, 128 S. Ct. at 2773 (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S. Ct. 612, 649 (1976)).

While *Davis* did not deal with a public campaign finance system, it nonetheless has significant implications for public campaign finance systems. In particular, this Court found that:

> The argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office. . . . Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices. *Id.* at 2773-2774.

Given that public financing efforts have been presented repeatedly and clearly as a means to "level the playing field" in elections, it is clear that such systems must face significant constitutional scrutiny in light of this Court's explicit language in *Davis*.

The Petitioners have spent, or intend to spend, money on speech advocating the defeat of a government funded candidate, or the election of a privately

financed candidate facing a government funded opponent. The result of those expenditures has been or will be the disbursement of public funds by a government agency directly to the candidate those expenditures were designed to help defeat. Thus, the burden on political speech is even more readily apparent in the Petitioners' case than in *Davis* because there is an immediate and automatic disbursement of funds to the candidate the speaker opposes.

The burden on speech that this Court struck down in *Davis* was the mere opportunity to raise more money under increased contribution limits (and the suspension of the party coordinated expenditure limits). *Davis*, ___ U.S. at ___, 128 S. Ct. at 2765. Unequal contribution limits are certainly a benefit, but not nearly the same benefit as a check cut by the government directly to your opponent's campaign.

This Court, in *Buckley*, held that involuntary limits on a candidate's campaign expenditures are unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 58, 96 S. Ct. 612, 653. "This holding would be rendered meaningless if the government could effectively force a candidate into accepting expenditure limits by providing overwhelming benefits to participating candidates." *Gable v. Patton*, 142 F.3d 940, 948 (6th Cir. 1998) (citing *Buckley*, 424 U.S. at 58, 96 S. Ct. at 653). *Buckley*'s holding is also rendered meaningless if the government can coerce privately funded candidates to abide by expenditure limits by punishing those who refuse to participate in public campaign finance schemes. *Id.* at 948.

Under matching funds provisions, the harder a privately financed candidate works at fundraising, the more his government funded opponent benefits. Matching funds give government funded candidates a free ride on their privately financed opponents' coattails. The result is that privately funded candidates face two choices, both bad: accept expenditure limits by running for office with government funds or suffer the punitive provisions of the public campaign finance scheme.[6]

Any limitation upon private expenditures for political speech, whether direct or indirect, is not compatible with the First Amendment's free speech guarantee. Matching funds are designed to limit both candidate speech and independent expenditures. Matching funds thus compel privately financed candidates to abide by the same expenditure limits as government funded candidates and punish those candidates or independent groups who dare to robustly exercise their free speech rights.

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[6] North Carolina's increased reporting requirements tie up privately financed candidates' time and resources without making the political process more transparent. The only purpose of the reporting requirements is to facilitate equalization payments to government-subsidized candidates.

CONCLUSION

The Petitioners have stated a colorable First Amendment claim that North Carolina's public campaign finance scheme's matching funds provision discourages and penalizes their free speech rights. In light of this Court's recent and repeated emphasis on the importance of developing a factual record in election law cases, it was wholly inappropriate for the district court to dismiss Petitioners' as-applied challenge without requiring the government to prove its assertions as to the compelling need for the law or allowing Petitioners the opportunity to conduct discovery and build their fact record. This Court should grant the Petition and strike down the North Carolina law as inconsistent with fundamental First Amendment rights. If this Court declines to go that far, however, the Fourth Circuit's decision should be vacated and the case remanded for further proceedings consistent with the basic requirements of the First Amendment and the Federal Rules of Civil Procedure.

Respectfully submitted,

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App. 1

[LOGO]

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[Names Omitted In Printing]

July 21, 2008

Mr. William Castner, Executive Director
Assembly Democratic Office
P.O. Box 098
Trenton, New Jersey 08625

Dear Mr. Castner:

You have asked for a legal opinion as to the implications of the recent decision of the United States Supreme Court in *Davis* v. *Federal Election Commission*, 554 *U.S.* ___ (June 26, 2008)[1], for certain provisions of Assembly Bill No. 100[2] that would provide a General Assembly candidate who participates in a

[1] 2008 *U.S. Lexis* 5267.

[2] A-100 was reported from the Assembly State Government Committee on June 12, 2008 and referred to the Assembly Budget Committee.

public financing pilot program with additional public funds ("rescue money") when a nonparticipating opponent receives contributions that are greater than the maximum amount of public funds the participating candidate may receive or when certain independent expenditures benefit the nonparticipating candidate or unfavorably affect the participating candidate.

For the reasons set forth below, it is our opinion that, if Assembly Bill No. 100 is enacted into law in its current form, a reviewing court, relying on the Supreme Court's *Davis* decision, would likely find the rescue money provisions to violate the First Amendment.

A-100 would enact "The 2009 New Jersey Fair and Clean Elections Pilot Project Act" to establish a temporary program for the public financing of candidates seeking nomination and election to the General Assembly from eight legislative districts in 2009. The bill provides financing for all certified candidates at various rates depending on political party affiliation or non-affiliation, and whether a candidate is running unopposed. Under the bill, a political party candidate will receive $37,500 to run in the primary election if the candidate raises at least 400 qualifying contributions of $10 each before May 15, 2009 and an additional $37,500 if the candidate raises a total of 800 such contributions before that date. In the general election, a political party candidate who was nominated at the primary and received at least 400 qualifying contributions before August 14, 2009 will

receive $37,500 to run in the general election and an additional $37,500 if the candidate raises a total of 800 such contributions before that date. A candidate who raises between 400 and 800 contributions will receive a proportional share of such funding. An unopposed party candidate will receive half of these amounts. The same or lesser amounts are available under similar circumstances to certified candidates who are members of political groups permitted to register their members by use of a voter registration form or that are named on a political party declaration form and to other candidates. Section 12.

The bill provides "rescue money" to a certified candidate, pursuant to a determination by ELEC, who is running against a candidate who does not accept public financing, when the opposing candidate has received contributions greater than the maximum amount that the certified candidate can receive in the primary election or the general election. The rescue money will be provided to a certified candidate in increments of at least $1,000, and will not exceed $75,000 per election for a major party candidate or a member of a political group that is permitted to register its members by use of a voter registration form or that is named on a political party declaration form, and in $500 increments not to exceed $37,500 for other candidates. The bill provides similar amounts of rescue money to a certified candidate whose campaign is being negatively affected by independent expenditures, as determined by ELEC, in a primary election or general election. Section 13.

In *Buckley* v. *Valeo*, 424 *U.S.* 1 (1975), the leading case in the area of the abridgment of freedom of speech and association by the regulation of campaign finance, the United States Supreme Court considered a constitutional challenge to the Federal Election Campaign Act (FECA) Amendments of 1974. The amendments strictly limited the amount of money individuals were permitted to contribute and spend upon campaigns for federal office. The court noted that limitations on the amount of campaign contributions restrict the contributor's freedom of political association. It declared that the right of association is a fundamental right and that any action which may have the effect of curtailing the freedom to associate is subject to heightened scrutiny. However, even a significant interference with protected rights of political association may be sustained if the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms. In *Buckley*, the court determined that the law's primary purpose of limiting the actuality or appearance of corruption resulting from large financial contributions was sufficiently strong to justify the infringement on individual rights resulting from the limits on the amount of campaign contributions. However, *Buckley* rejected limits on campaign expenditures because such limits infringed upon freedom of association but did not present the same risk of corruption. In addition, the *Buckley* decision rejected the argument that limits on the expenditure of a candidate's personal

funds could be justified on the grounds that these limits equalized candidates' financial resources.

In the campaign finance cases decided since *Buckley*, the United States Supreme Court has made it clear that statutory limitations on campaign finance infringe on fundamental First Amendment rights and must be subjected to close scrutiny, and that the only justification for infringement of First Amendment rights is the prevention of actual or perceived corruption.[3]

In *Davis*, the United States Supreme Court considered a First Amendment challenge to the so-called "Millionaire's Amendment", part of the Bipartisan Campaign Reform Act of 2002. Federal law limits the amount of a contribution that a candidate for the House of Representatives may accept from an individual donor to $2,300. It also provides that a contribution may not be accepted from an individual whose aggregate contributions to all candidates during an election cycle have reached the legal limit on such contributions of $42,700. In addition, a candidate may not accept general election coordinated expenditures by a national or state political party committee that exceed $40,900. However,

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[3] *First National Bank of Boston* v. *Bellotti*, 435 *U.S.* 765 (1978); *Citizens Against Rent Control* v. *Berkeley*, 454 *U.S.* 290 (1981); *California Medical Association* v. *Federal Election Commission*, 453 *U.S.* 182 (1981); *Nixon* v. *Shrink Missouri Government*, 528 *U.S.* 377 (2000); *McConnell* v. *Federal Election Commission*, 540 *U.S.* 93 (2003).

under the "Millionaire's Amendment", when as a result of a candidate's expenditure of personal funds, the "opposition personal funds amount" (OPFA – the amount determined by adding personal funds expended to 50% of the funds raised for the election measured at designated dates in the year preceding the election) exceeds a certain amount ($350,000), the limit on contributions to the "non-self-funding" candidate is increased from $2,300 to $6,900 and that candidate may accept coordinated party expenditures without limit.

Davis, a "self-funding" congressional candidate, asserted that by giving a fundraising advantage to his "non-self-financing" opponent when Davis' expenditure of personal funds exceeded the threshold amount, the Millionaire's Amendment burdened Davis' ability to expend personal funds in violation of the First Amendment. The court found that while the law did not expressly limit the expenditure of a candidate's personal funds, it imposed an "unprecedented penalty on any candidate who robustly exercises" the candidate's First Amendment right to expend his own funds by creating "fundraising advantages for opponents in the competitive context of electoral politics."[4] This burden on the expenditure of personal funds caused a candidate to "shoulder a special and potentially significant burden"[5] if he chose

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[4] *Davis*, No.07-320, slip op. at 12-13

[5] *Id.* at 12

to spend personal funds above the threshold amount. Because the burden was substantial, the provision must be justified by a compelling state interest and narrowly tailored to further that interest. The court reaffirmed *Buckley's* finding that limits on the expenditure of personal funds do not reduce the risk of actual or perceived corruption. The only government interest promoted by the impairment of the ability to expend personal funds was in equalizing the relative financial resources of candidates, an interest that the court found insufficient to justify the infringement of First Amendment rights. Accordingly, the court held that the "Millionaire's Amendment" was unconstitutional.[6]

It is noteworthy that, in *Davis*, the Supreme Court cited with approval *Day* v. *Holahan*, 34 *F.3d* 1356 (8th Cir. 1994) which held that a Minnesota law increasing a candidate's expenditure limits and eligibility for public funds based on independent expenditures against the candidate's candidacy impermissibly burdened the speech of those making independent expenditures.[7] The statute at issue in

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[6] A dissenting opinion by Justice Stevens, in which three other justices joined, argued that any infringement on First Amendment rights resulting from the Millionaire's Amendment was justified by Congress's desire to reduce the importance of wealth as a criterion for public office and to counter the perception that seats in Congress are available for purchase by the wealthiest bidder.

[7] It is also noteworthy that the Supreme Court did not discuss other decisions from various federal circuit courts of

(Continued on following page)

that case was similar to the rescue money provisions of A-100 that apply to independent expenditures.

In *Buckley*, the court had expressly upheld a voluntary program for the public financing of campaigns for elective office against a First Amendment challenge because the purpose of public funding is not to "abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424

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appeal that were relied upon in the decision of the federal district court in *Davis* v. *Federal Election Commission*, 501 *F.Supp.2d* 22 (D.D.C. 2007); *Daggett* v. *Comm'n on Gov't Ethics and Election Practices*, 205 *F.3d* 445 (1st Cir. (2000), upholding a provision of the Maine Clean Election Act providing public matching funds to a candidate participating in a public financing program when independent expenditures are made against him or on behalf of his nonparticipating opponent; *Gable* v. *Patton*, 142 *F.3d* 940 (6th Cir. 1998), upholding a waiver of voluntary expenditure limits for a candidate participating in public matching funds program when a nonparticipating candidate raised funds in excess of that expenditure cap; *Rosensteil* v. *Rodrieguez*, 101 *F.3d* 1544 (8th Cir. 1996), upholding a provision of a public financing program that raised the voluntary expenditure cap when a privately financed candidate exceeded that amount; and *Vote Choice, Inc.* v. *DiStefano*, 4 *F.3d* 26 (1st Cir.1993), upholding a statute allowing publicly-funded candidates who agreed to an expenditure limit to accept $2,000 contributions while limiting nonparticipating candidates to $1,000 contributions. See also *Green Party of Connecticut* v. *Garfield*, 537 *F.Supp.2d* 359 (D. Conn. 2008) upholding against First Amendment challenge a statute providing additional public funds to a candidate participating in a public financing program if outspent by a non-participating candidate or by any other non-candidate.

U.S. at 92-93. However, the only purpose served by providing additional public funds to a candidate participating in a public financing program in order to counter an opponent's expenditures above a threshold amount, or independent expenditures that have a negative effect, is to create a more level playing field by equalizing funding between candidates. Like the increased limits at issue in *Davis*, which discouraged a self-financing candidate's expenditure of personal funds, the rescue money provisions of A-100 would deter freedom of expression by a nonparticipating candidate or a group making an independent expenditure without sufficient justification because rescue money does not address the risk of actual or perceived corruption. The rescue money provisions of A-100 would not cap the nonparticipating candidate's expenditures, but these provisions would sufficiently burden a candidate's ability to spend his or her campaign funds[8] that they would likely be successfully challenged under the rationale of *Davis*. Thus, while under *Buckley* a voluntary public financing program is constitutional, it appears that under *Davis* providing additional public funds to a participating candidate in response to expenditures

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[8] In New Jersey, a candidate's personal funds used on behalf of the candidate's campaign must be deposited into the campaign depository and reported as either contributions or loans in the same manner as other contributions or loans. *ELEC Compliance Manual for Candidates*. Thus, a candidate's campaign funds may include both personal funds and donor contributions.

by a non-publicly funded opponent or an independent group above a threshold amount is likely unconstitutional.

In conclusion, it is our opinion that if Assembly, No. 100 is enacted into law in its current form, a reviewing court would likely find the rescue money provisions to violate the First Amendment.[9]

Very truly yours,

Albert Porroni
Legislative Counsel

By: /s/ Peter J. Kelly
Peter J. Kelly
Principal Counsel

AP:K/jb

c. Assemblyman Greenwald, Assemblywoman Handlin, Assemblyman Johnson and Assemblywoman Vainieri Huttle pursuant to P.L.1999, c.244.

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[9] It should be noted that when a court determines that a statutory provision is unconstitutional, the court will sever that provision and give effect to the remainder of the law to the extent that it can do so without impairing the principal legislative objective. N.J.S.A.1:1-10; *Trade Waste Management Ass'n, Inc.* v. *Hughey*, 780 *F.2d* 221 (3d Cir. 1985). The main purpose of A-100 is to establish a public financing pilot program for certain legislative candidates. Accordingly, it would appear likely that a reviewing court would sever the rescue money provisions of A-100 from the remainder of the legislation.